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into the Deployment of
Canadian Forces to Somalia

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Commission d'enquête
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Forces canadiennes en Somalie

Law Applicable to Canadian Forces in Somalia 1992/93

a study prepared for
the Commission
of Inquiry into
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Abbreviations and Acronyms

Capt (N)	Captain (N) (Naval rank)
CAR	Canadian Airborne Regiment
CARBG	Canadian Airborne Regiment Battle Group
CF	Canadian Forces
CDS	Chief of Defence Staff
CJFS	Canadian Joint Force Somalia
CMAC	Court Martial Appeal Court
DND	Department of National Defence
ICRC	International Committee of the Red Cross
JF	Joint Force
LCol	Lieutenant-Colonel
LOAC	Law of Armed Conflict
NATO	North Atlantic Treaty Organization
NDA	*National Defence Act*
QR&O	Queen's Regulations and Orders for the Canadian Forces
ROE	Rules of Engagement
R.S.	Revised Statutes of Canada, 1985
SOFA	Status of Forces Agreement
UN	United Nations
UNITAF	Unified Task Force
UNOSOM	United Nations Operation in Somalia
UNTS	United Nations Treaty Series

Introduction

This study examines aspects of penal international and national law that applied to the Canadian Forces (CF) as part of the United Nations Operation in Somalia[1] (UNOSOM I) and as part of the Unified Task Force in Somalia (UNITAF), during their deployment there from December 1992 to June 1993.[2] In that context the study examines questions as to the applicability of the criminal law of Somalia, the criminal law of Canada, the military law of Canada and the international law of armed conflict. It also makes brief comments on the CF Rules of Engagement (ROE) that specified when and to what extent members of the CF were, or were not, to use force against persons in Somalia. The ROE will, no doubt, be examined at length in the *Report of the Commission of Inquiry into the Deployment of the Canadian Forces to Somalia* (hereafter referred to as "Report of the Somalia Commission"). In any event, the ROE were not "law" in themselves; indeed they were only lawful orders to the extent that they were consistent with applicable law so soldiers, in complying with the ROE, would not be committing crimes.[3]

CHAPTER ONE

National Law

TERRITORIAL PRINCIPLE OF CRIMINAL JURISDICTION — SOMALI LAW

Under a well-established principle of international law which applies in peace and, with some exceptions, in time of war:

Acts or omissions that are committed *on the territory of a state* or in the airspace above it by anyone are subject to the criminal law of that state and to the jurisdiction of the courts of that state. This "territorial principle" of international law is universally recognized.[1]

Article 3 of the 1962 *Somali Penal Code*[2] is consistent with the territorial principle in stating:

Article 3 Persons to Whom the Penal Law is Applicable

1. Except as otherwise provided by municipal or international law, the Somali penal law shall be applicable to all, citizens or aliens, who are in the territory of the State.
2. The Somali penal law shall also be applicable to citizens or aliens who are outside the territory of the State, within the limits established by the said law or by international law.

Therefore, unless Somalia law or a superior rule of international law provided otherwise, the criminal law of Somalia applied to CF members in Somalia, and they were subject to the jurisdiction of lawfully constituted criminal courts of Somalia.

An in-depth review or examination of the criminal law of Somalia is not within the scope of this paper. However, it may be useful to note, relevant to incidents involving members of the CF, articles 5, 6, 434 and 440 which read as follows:

Article 5 Ignorance of Penal Law

No one may allege ignorance of the penal law as an excuse.

Article 6 Offenses Committed in the Territory of the State

1. Whoever commits an offense in the territory of the State shall be punished according to the Somali penal law.
2. An offense shall be deemed to be committed in the territory of the State where
   (a) the act or omission constituting it occurred therein, in whole or in part, or where
   (b) the consequences of the act or omission occurred therein.

Article 434 Murder

Whoever commits murder shall be punished with death.

Article 440 Hurt

1. Whoever
   (a) causes hurt to another
   (b) from which physical or mental illness results,
   shall be punished with imprisonment from three months to three years.

2. The hurt shall be deemed to be grievous and imprisonment from three to seven years shall be imposed:
   (a) where the act results in an illness which endangers the life of the person injured, or in an illness or incapacity which prevents him from attending to his ordinary occupation for a period exceeding forty days;
   (b) where the act produces a permanent weakening of a sense or organ;
   (c) where the party injured is a pregnant woman and the act results in the acceleration of the birth.

3. The hurt shall be deemed to be very grievous, and imprisonment from six to twelve years shall be imposed, where the act results in:
   (a) an illness certainly or probably incurable;
   (b) the loss of a sense;
   (c) the loss of a limb, or a mutilation which renders the limb useless, or the loss of the use of an organ or of the capacity to procreate, or a permanent

and serious difficulty in speech;
(d) deformity, or the permanent disfigurement of the face;
(e) the miscarriage of the person injured.

The December 1993 issue of the *UN Chronicle*[3] stated that:

He [the Secretary-General of the UN] called for expansion of the 5,000-person police force and stated that by 31 October [1993] an interim three-tier judicial system would be in place and the 1962 Criminal Procedure and Penal Codes would be enforced....

On 27 September [1993], the Justice Division of UNOSOM II certified the reopening of Somali courts at Mogadishu's Central Prison building. Pending reconstruction of court buildings in Somalia, cases were to be heard in the Central Prison. There were 480 cases awaiting hearings.

Thus it appears that, although the *Somali Criminal Procedure Code* and the 1962 *Somali Penal Code* were not being enforced during the UNITAF operation because of the lack of functioning Somali police forces, courts and judicial administration, these codes had not been repealed. If that were so, then presumably any crimes under the *Somali Penal Code* allegedly committed by members of the CF in Somalia in 1992-93 could, subject to any immunity or exemptions under international law, or subject to any statutory limitation period or requirement for court jurisdiction over the accused under Somali law, e.g., by presence of the accused in Somalia at time of trial, still be charged under Somali law, and tried by Somali courts.

Under the following procedures or principles of international law, members of the CF in Somalia could have been exempted from the application of Somalia criminal law:

(a) Somalia could have undertaken in an agreement with the United Nations or Canada to exempt the members of the CF in UNOSOM or UNITAF respectively from the criminal jurisdiction of the courts of Somalia; i.e., an agreement or agreements of the type often called a Status of Forces Agreement, or SOFA, could have been concluded.

(b) Even in the absence of a SOFA, foreign armed forces in the territory of the host state, with the latter's consent, are immune from the criminal jurisdiction of the courts of the host state in respect of certain offences,

and carry with them their own military law and court-martial jurisdiction.[4] However, given the conditions in Somalia in 1992, it is most unlikely that there was any state governmental authority that could have consented to the entry into Somalia of UNOSOM or UNITAF.

(c) During wartime combat operations, combatants do not commit crimes by wounding or killing the enemy in accordance with the Law of Armed Conflict (LOAC).[5]

(d) As one author has put it:

> Article 64 of the Fourth Geneva Convention states that the penal laws of the occupied territory are to remain in force and tribunals continue to function in respect of all offences covered by those laws. The occupying power may however repeal or suspend these laws where they constitute: (i) a threat to its security, and (ii) an obstacle to the application of the Convention.[6]

As regards status of forces agreements, the Law Reform Commission of Canada had this to say:

> [CF members] are, pursuant to sections 120 and 121 [now 130 and 132] of the *National Defence Act*, subject to the criminal law of Canada while serving [in Canada or] abroad and also to the criminal law of the state in whose territory they are serving (the receiving state). They are subject to the concurrent jurisdiction of Canadian service tribunals and the courts of the receiving state. Their immunity *in certain cases* from the jurisdiction of the criminal courts of the receiving state flows, in the absence of a treaty or other agreement in that respect between Canada and the receiving state concerned, directly from customary international law. Most often the matter is governed by a bilateral agreement between Canada and the receiving state or by a multilateral agreement to which Canada and the receiving state are parties.
>
> In states of the North Atlantic Treaty Organization (NATO), the customary international law rules have been replaced by express provisions in a multilateral agreement governing the exercise of jurisdiction by the courts of the receiving and sending states over members of visiting armed forces from a NATO state. The agreement, called the *North Atlantic Treaty Status of Forces Agreement* or "NATO SOFA" was signed in 1951 and applies to all NATO states.
>
> Under Article VII of the NATO SOFA, the service tribunals of the Canadian Forces serving in any NATO state (for example, the United States, the United

Kingdom, or the Federal Republic of Germany), have primary jurisdiction to try members of a Canadian visiting force and members of the civilian component of the Canadian Forces (including — to the extent authorized by Canadian law — Canadian civilian school teachers of Canadian dependant children there and civilian employees from Canada working for the Canadian Forces there) for (i) offences solely against the property or security of Canada, or offences solely against the person or property of another member of the Canadian visiting force, or civilian component of the Canadian visiting force or dependant of either, and (ii) offences arising out of any act or omission done in the performance of official duty.

In all other cases, the courts of the receiving state have the primary right to exercise jurisdiction.

The NATO SOFA further provides that the state having primary jurisdiction shall give sympathetic consideration to a request from [the authorities of] the other state for a waiver of that jurisdiction.

...The offender is protected against double jeopardy by a provision in the NATO SOFA that, where a member of the visiting force or civilian component or dependant has been tried by a court of the sending state or receiving state in respect of a particular offence, he or she may not be tried again for that same offence by a court of the other state.[7]

Some UN peacekeeping missions — those in Egypt and Cyprus, for example — were covered by a SOFA between the Secretary-General of the UN and Egypt and Cyprus respectively. These agreements provided for immunity of UN forces from criminal jurisdiction of the host state. The writer is not aware of any SOFA between the UN and Somalia regarding UNOSOM. In any event, the subsequent operation, UNITAF, was not a United Nations operation to which a UN SOFA would have applied.

As regards (b) above, several decades ago, the Supreme Court of Canada considered the extent to which international law provided immunity to a visiting U.S. force in Canada from the jurisdiction of criminal courts in Canada.[8] This was before the NATO SOFA was signed and before Canada's *Visiting Forces Act*[9] was enacted. According to Mr. Justice Kerwin:

By international law there exists an exemption from criminal proceedings prosecuted in Canadian criminal courts of the visiting members of the United States forces....[10]

and Mr. Justice Rand:

> The members of United States forces are exempt from criminal proceedings in Canadian courts for offences under local law committed in their camps or on their warships, except against persons not subject to United States service law, or their property, or for offences under local law, wherever committed, against other members of those forces, their property and the property of their government; but the exemption is only to the extent that United States courts exercise jurisdiction over such offences.[11]

It is most unlikely that the UNITAF was in Somalia with the permission of any Somali who, at that time, could speak internationally on behalf of Somalia, for as the Secretary-General of the UN reported to the Security Council in April 1992: "There is no functioning Government and political instability prevails throughout the country"[12] and in March 1993:

> The absence of a central Government has aggravated the social, economic and political difficulties in the country. In fact, the nonexistence of a Government in Somalia is one of the main reasons for the now more robust role of the Organization in the country.[13]

Even if UNITAF was in Somalia with proper permission, the Supreme Court of Canada opinion mentioned above suggests that the customary immunity of members of visiting forces from the criminal jurisdiction of the host state would not have extended to offences against nationals of the host state — in this case, Somalis.

As regards (c) above, since there was apparently no "enemy" as such confronting the CF in Somalia, it is unlikely that members of the CF could claim "combatant" status as a defence to any criminal charge.

As regards (d) above, even if Canada or any other state had had the formal status of an occupying power in Somalia, which is unlikely, the writer is unaware that it repealed or suspended any criminal laws.

In short, it appears that:

(a) There was no Status of Forces Agreement between Canada and Somalia, or between the UN and Somalia, or between UNITAF and Somalia, granting members of the CF immunity from the applicability of Somali criminal law and the jurisdiction of Somali courts.

(b) Customary international law applicable to visiting forces in a country with permission of the government of that country would not offer such immunity where the victim is a national of the host state.

(c) Since, as discussed later in this study, Somalis were not enemy combatants vis-à-vis members of the CF, CF members could not claim immunity from prosecution under Somali law on the basis of the Law of Armed Conflict.

(d) No Somali criminal laws were repealed or suspended by any "occupying power."

To some extent, whether or not Somali criminal law applied to the conduct of CF members serving there is a moot issue. As mentioned above, the Somalia criminal justice system was not functioning during the CF deployment, and the writer is not aware of any charges under Somalia criminal law having been laid against CF members. However, the remote possibility that such charges might be laid in the future cannot be ignored.

NATIONALITY PRINCIPLE OF CRIMINAL JURISDICTION — CANADIAN LAW

Besides the possible applicability of Somali criminal law, the only other national criminal law generally applicable to members of the CF in Somalia was Canadian. This follows from the nationality principle of criminal jurisdiction in international law:

> The "nationality principle" in international law recognizes the right of a state to apply its criminal law to its citizens, nationals, or other persons owing allegiance to it, in respect of their conduct anywhere in the world, and recognizes the power of its courts to exercise criminal jurisdiction over such conduct.[14]

Only exceptionally does Canadian criminal law apply to acts or omissions of persons outside the territory of Canada.[15] One of the major exceptions is to be found in the *National Defence Act* which makes members of the CF subject to trial by service tribunals (summary trial or court-martial) for offences against any statute of Canada committed anywhere in the world.[16] Hence, besides being subject to service trials for military offences specified in the *National Defence Act*, such as insubordination

and desertion committed anywhere, CF members can be tried by CF service tribunals for offences under other Canadian statutes such as the *Criminal Code* of Canada[17] and the *Geneva Conventions Act*[18] committed in Somalia or any other country. Furthermore, the *National Defence Act* makes CF members subject to trial by civil courts in Canada on charges arising out of acts or omissions abroad.[19]

Most conduct that would amount to a "grave breach"[20] of the 1949 Geneva Conventions or the 1977 Protocols[21] would also amount to a criminal offence under Canadian law; for example "serious injury to body" or the intentional killing of a "protected person" prohibited by the Conventions would also amount to assault causing bodily harm and murder respectively under Canada's *Criminal Code*.

Hence a person who commits a grave breach of one of the Conventions or Protocols could be tried by a civil court in Canada when charged with any of the following offences:

- having committed a grave breach *constituting an offence* under section 3 of the *Geneva Conventions Act* — regardless of the citizenship of the accused or where in the world the offence was committed, and whether or not the accused is a member of the CF; or
- having committed, anywhere in the world, war crime or crime against humanity under section 7(3.71) of the *Criminal Code* (if the conditions set out in that section are met);[22]
- having committed murder or assault causing bodily harm, anywhere in the world, if the person is subject to the Code of Service Discipline set out in the *National Defence Act*;[23] or
- having committed murder or assault causing bodily harm in Canada.

Furthermore, a member of the CF or other person subject to the Code of Service Discipline (for example, a dependant accompanying a Canadian soldier serving outside Canada, or a civilian contractor with the CF outside Canada) could be tried by a CF service tribunal[24] for:

- the offence of a grave breach under the *Geneva Conventions Act* and section 130 of the *National Defence Act* committed anywhere in the world; or
- a Canadian *Criminal Code* offence under section 130 of the *National Defence Act*, for example, murder, committed anywhere in the world (except Canada)[25] or assault causing bodily harm committed anywhere in the world; or

- a war crime or a crime against humanity under section 7 (3.71) of the *Criminal Code* committed anywhere in the world (except in Canada for certain offences)[26]; or
- an offence under section 132 of the *National Defence Act*[27] against the law of Somalia.

It should be mentioned, however, that the *National Defence Act* imposes a three year limitation period for the trial of most offences by CF service tribunals.[28] It specifies that, subject to a few exceptions, no person can be tried by a service tribunal unless the trial begins within three years of the commission of the alleged offence. The exceptions to this three year rule are mutiny, desertion, absence without leave, any service offence for which the highest punishment is death, or an offence under section 130 of the *National Defence Act* that relates to a grave breach referred to in section 3(1) of the *Geneva Conventions Act*.[29]

It should be noted that the three year limitation period applies to trials by service tribunals only — not to civil courts, and that, as mentioned above, under section 273 of the *National Defence Act*, civil courts in Canada have jurisdiction to try persons on criminal charges for acts or omissions committed outside Canada while they were subject to the Code of Service Discipline. Hence, although CF tribunals realistically could no longer try offences that occurred in Somalia in 1993 unless they related to the 1949 Geneva Conventions, civil courts in Canada could do so.

CHAPTER TWO

The Law of Armed Conflict (International Humanitarian Law)

In addition to national criminal law, there is a large body of international law that applies to soldiers and others in regard to war and certain other "armed conflicts." It is known as the Law of War, or International Humanitarian Law, or the Law of Armed Conflict (LOAC). As it obviously relates to several issues being examined by the Commission of Inquiry, such as the legitimacy of the use of armed force by the CF against Somalis, and the treatment of civilians — in particular detainees in the custody of the CF — this chapter will examine (albeit briefly):

- what the LOAC is;
- why the LOAC is relevant to the Somalia Commission's Inquiry;
- the LOAC's background;
- sources of the LOAC;
- obligations under the LOAC of nations, armies, commanders and soldiers in time of peace, and as well as in time of armed conflict;
- conflicts to which the LOAC applies, particularly the extent to which it applies to UN operations or UN-authorized operations; and
- whether the law of armed conflict applied to the CF in Somalia in 1992 and 1993.

WHAT IS THE LAW OF ARMED CONFLICT (LOAC)?

The LOAC describes the international rules governing the rights and obligations of combatants and non-combatants during war or other international armed conflict[1] and, to some extent, during civil wars or non-international armed conflicts. These rules aim to temper the destructive and painful consequences of war by setting limits on methods of warfare. They also seek to protect non-combatants, whether they be wounded, sick or captured soldiers, or civilians.

Among the equivalent expressions — the "Law of War," the "Law of Armed Conflict" and "International Humanitarian Law" (IHL) the first one is the oldest. This expression the "Law of War" dates from the time when it was customary for a state to "declare war" before launching an armed attack on another state. Today, the word "war" is still frequently used in regard to armed conflicts even if war is not formally declared. However, the expression "Law of Armed Conflict"[2] more accurately describes the broader range of contemporary conflicts to which the law applies.[3] In British and American military circles the expressions "Law of War" and "Law of Armed Conflict" are commonly used, but "International Humanitarian Law" seems to be the expression of choice in Red Cross and academic circles.[4] While the three terms are often used interchangeably in treaties and writings, this paper will use "Law of Armed Conflict," which is the expression generally used by the CF.[5]

THE RELEVANCY OF THE LOAC

The following are several of the reasons why the LOAC is relevant to the deployment of Canadian Forces in Somalia. First, the terms of reference of the Somalia Commission of Inquiry *implicitly* obliged it to inquire into:

- the teaching and training of Canadian Joint Force Somalia (CJFS)[6] personnel in the law governing armed conflicts;
- the extent to which CJFS personnel understood that law;
- the extent to which the law applicable to armed conflicts applies to UN military operations and UN authorized military operations;
- the extent to which the CJFS complied with that law; and
- Rules of Engagement, which must conform to the LOAC.[7]

Canada, as a party to the 1949 Geneva Conventions,[8] is obliged to ensure that all members of the Canadian Forces are taught the fundamentals of those conventions that form such a large part of the LOAC.

Second, if the LOAC did apply to the CF in Somalia, this could determine what criminal charges could be laid and the limitation period for prosecuting those charges. Third, if the LOAC, in particular the fourth (civilian) Geneva Convention, did apply, this would provide a clear set of legal standards — duties relating to the treatment of civilians — against which to assess the conduct of CF members.

Even if the LOAC did not apply to the Somalia mission because it was not an "armed conflict," it nonetheless provides a useful internationally agreed minimum standard to be complied with by armed forces even in wartime and, therefore, a reasonable standard against which to assess the conduct of CF members in less than war operations.

The LOAC is also relevant for another reason. The degree of importance attached to it by an armed force reflects on the culture in, and leadership of, that force.

THE LAW OF ARMED CONFLICT — BACKGROUND

The Law of Armed Conflict has ancient origins.[9] These extend much farther back than the first Red Cross conference in 1864 which gave birth to the original Geneva Convention for the Protection of War Victims.[10] In the fourth century B.C., the Chinese scholar Sun Tzu argued that only the absolute minimum harm required to achieve military victory should be inflicted on enemies. The sacred texts from ancient India contained prohibitions on certain tactics. The Bible also sets norms. For example, Deuteronomy and the Book of Kings describe norms for the care of civilians and prisoners. Josephus, writing in the first century A.D., discussed rules of war in his *Antiquities of the Jews*. In the seventh and ninth centuries, Islamic texts and commanders expressly forbade killing prisoners and harming non-combatants such as women and children. In the 1300s, knights in England and France could be tried by military courts of chivalry for misconduct in the battlefield.[11]

Grotius, among the original scholars of international law, wrote in detail in 1625 about principles restricting the use of force.[12] Similar principles going back many centuries have been found in the customary law of countless African societies.[13] The 1863 Lieber Code, prepared during the U.S. Civil War, set out rules for the conduct of war. The Code, prepared at the request of President Lincoln, was published a year before the original Geneva Convention.[14]

Clearly, then, norms regulating the conduct of combatants in times of conflict are not only of ancient origin but they are also found in diverse cultures on many continents. This is important when considering two topics addressed later: the notion of "customary" legal norms in international law and the concept of "universal" jurisdiction over certain violations of the LOAC. We now turn to an examination of the "operational" obligations that the LOAC imposes on military forces.

SOURCES OF THE LAW OF ARMED CONFLICT

Today, the main rules of the LOAC are found in three sources:[15]

- the Hague Conventions of 1907, which place limits on the methods, ways and means of conducting international armed conflict;[16]
- the four Geneva Conventions of 1949 relating to the protection of the victims of armed conflict;[17] and
- the two 1977 Additional Protocols to the 1949 Geneva Conventions augmenting the rules in the Hague and Geneva Conventions.[18]

The Hague Conventions

The Hague Conventions are a key source of the LOAC. These treaties, often referred to as the "Law of the Hague," date back to the last century. Much of their content is now considered "customary law" binding on all states.[19] The Law of the Hague limits the means and methods of conducting actual military operations in armed conflict.[20] In particular, the 1907 Hague rules state that the methods of conducting war are not unlimited. For example, under the principle of proportionality, Prof. Green explains that "There must be an acceptable relationship between legitimate destructive effect and undesirable collateral effects,[21] the latter being "damage caused to civilians, civilian objects and other protected persons or installations."[22] Applied to a theatre of operations, "[t]his means that the commander is not allowed to cause damage to non-combatants which is disproportionate to military need."[23]

The Geneva Conventions

The four Geneva Conventions of 1949 relate to the protection of victims of armed conflict. All states can become parties. The Conventions set out the extensive rights and obligations of states and persons during armed conflict between states and, to a limited extent, during non-international armed conflict such as civil war. The Conventions provide for the protection of the wounded and sick, the shipwrecked, prisoners of war, and civilians. Almost all the world's nation-states — more than 180 — including Canada, are parties to, and bound by, these Conventions.[24] Most importantly, the courts of literally any state in the world can impose penal sanctions on anyone committing or ordering to be committed any "grave breach" of any of the four 1949 Geneva Conventions. Each Convention

defines its "grave breaches." For example, articles 146 and 147 of the Fourth Geneva Convention (the protection of civilians) state:

ARTICLE 146 [Penal sanctions I. General observations] The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

ARTICLE 147. [II. Grave breaches] Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The Additional Protocols of 1977

The Geneva Conventions have been supplemented by two further international treaties, commonly referred to as the Additional Protocols I and II of 1977.[25] Protocol I applies to international armed conflicts. It sets

further important limits on the use of force which could cause unnecessary suffering and damage, and elaborates on the Geneva Convention rules for the protection of civilians. Protocol II extends certain of the rules of international armed conflict to non-international armed conflicts, offering the hope of protection to countless victims of civil wars around the globe. Each of the Protocols has been adopted by more than 100 states.[26]

THE OBLIGATIONS OF NATIONS, ARMIES, COMMANDERS AND SOLDIERS

Under Conventional International Law

It should be stressed that the Law of Armed Conflict creates obligations on most states, including Canada, during peace as well as during armed conflict. States have a fundamental obligation "to respect and ensure respect for the Geneva Conventions" under common article 1 of the four Conventions. This obligation encompasses the duty to ensure that not only members of the armed forces but the entire population of the state are aware of the Conventions' provisions. In his authoritative commentary on the Geneva Conventions, the distinguished scholar Jean Pictet noted that "a knowledge of law is an essential condition for its effective application. One of the worst enemies of the Geneva Conventions is ignorance."[27]

The importance of dissemination of an instruction in them is emphasized in each of the four Geneva Conventions. For example, article 47 of the First Convention requires that members of "the armed fighting forces, the medical personnel and the chaplains" receive instruction in the LOAC. Pictet explains that this duty is "general and absolute" and "has to be complied with both in time of peace and in time of war."[28] Additional Protocol I elaborates on this point, requiring legal advisors to be available to provide advice to commanders on the appropriate instruction to be given on the LOAC to the armed forces.[29] Specific obligations of military commanders are stated in article 87 of Protocol I as follows:

Article 87 – Duty of *commanders*

1. The High Contracting Parties and the Parties to the conflict shall require military *commanders*, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where

necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, *commanders* ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any *commander* who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.[30]

The important question of the adequacy of LOAC training in the Canadian Forces is addressed in a study prepared for the Commission and recently published.[31]

Signatories to the Geneva Conventions of 1949 and the Additional Protocols of 1977 have undertaken "to respect and ensure respect for the Present Conventions in all circumstances."[32] These treaties, as well as customary law, impose duties on nations:

- to disseminate to their citizens and in particular their armed forces the norms and rules of the Law of Armed Conflict;[33]
- to train the members of their armed forces in the Law of Armed Conflict;[34]
- to comply, and promote compliance with the Geneva Conventions and Protocols;[35] and
- to punish those who fail to comply with their obligations under the Geneva Conventions and Additional Protocols.[36]

Thus, states party to the Conventions and Protocols are clearly obligated to provide for the training in, and dissemination and enforcement of, the Conventions and Protocols.

Under Customary International Law

Nations that have signed and ratified treaties, such as the 1949 Geneva Conventions, are bound to apply the provisions of them. But even nations that are not parties to certain conventions are bound to apply provisions

of them that represent customary international law. It is clear that a growing core of the LOAC, though by no means all of it, is increasingly recognized as "custom" which all nations are obliged to respect and apply — at least in armed conflicts described in LOAC treaties.[37] However, while there are clearly some IHL rules (e.g., the 1907 Hague Rules) which can authoritatively be said to have attained the status of customary international law, the boundaries of customary, as distinct from treaty, law are not clear.[38] There is good authority that the Geneva Conventions, though not all the provisions of the Additional Protocols, express general international law.[39]

Protocol I can fairly be described as:

> ...mostly reaffirmations or clarifications of existing customary law, which implement the customary principles that a distinction should be made between combatants and civilians and that civilians and civilian objects may not be the targets of attacks.[40]

The U.S. government, which has not ratified the Additional Protocols of 1977, has nonetheless stated that it considers parts of Protocol I to be customary international law, and as such, binding on the United States and all other states.[41] This is but one example of the acceptance by states that humanitarian law includes some customary rules which, whether or not stated in a treaty, and whether or not a state has signed that treaty, impose legal obligations on that state.

The Martens Clause

The Martens clause in several LOAC treaties recognizes a broader range of obligations on the signatory states than appears in the specific obligation sections. The Martens clause first appeared in the Preamble to the Hague Convention II of July 29, 1899, and appears in several major humanitarian law treaties concluded since then, including the four 1949 Geneva Conventions.[42] It reads [translation]:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.[43]

The Martens clause is thus an important statement within a treaty that sets limits on behaviours not precisely covered by the particular treaty in question. It signals the view of the parties to those treaties that in cases apparently beyond the reach of the particular rules of the treaties, participants do not have carte blanche in their war efforts.

The enduring presence of the Martens clause, which appears as well in the two Additional Protocols, has led to the view that the Martens clause itself or, more precisely, its rule of universal minimum standards, has become customary law, as one noted author explains:

> Even if Governments question the applicability of common Article 3 and Protocol II to specific situations of non-international armed conflicts, they are nonetheless bound by some fundamental principles of humanity, such as those proclaimed by the Universal Declaration of Human Rights and other human rights instruments, where they are applicable and for those States who have ratified them. *They are also bound by the Martens Clause, to which Protocol II also refers in its Preamble, and which is a principle of customary law.*[44]

APPLICATION OF THE LAW OF ARMED CONFLICT

Types of Armed Conflict

Having examined the sources of LOAC and its basic rules, and having noted that much of it is binding on all states and persons under conventional (treaty) or customary international law, let us now turn to the types of armed conflict to which the LOAC applies. As mentioned earlier, the LOAC includes rules for the protection of victims of international conflicts and, to a lesser extent, victims of non-international conflicts. But the LOAC also includes rules to protect civilians in the territory of one state which is "occupied" by military forces of another state. The comments that follow concerning the applicability of the LOAC are therefore presented under the headings international armed conflicts, occupation of territory, and non-international armed conflicts.

International Armed Conflict. The 1949 Geneva Conventions are clearly applicable between or among states which are parties to the Convention in an *international* armed conflict. That is, each of the four Conventions by its terms applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[45] If

Canada were at war against a state party to the Conventions, all four of the 1949 Geneva Conventions and the two 1977 Additional Protocols would apply. However, if in that conflict there were another state (enemy of Canada) which is not party to the Conventions, they would not be applicable as between Canada and the non-party state unless the latter agreed to apply and did actually apply the Convention. However, insofar as the 1949 Geneva Conventions are now considered to be part of customary international law binding on all states, it is unlikely that any state involved in an international armed conflict could successfully argue that it was not bound by the Conventions. The same could be said of the government and other party or parties in a non-international conflict as regards the applicability of Common Article 3.

Occupation of Territory. Common Article 2 also provides that the four Conventions apply where all or part of the territory of a high contracting party is "occupied" by a foreign force, even though there is no resistance and hence no "armed conflict." Therefore, if the CF occupied territory of another state, all civilians in that territory other than Canadian citizens would be "protected persons" under the Fourth Geneva Convention. This means that Canada would have a series of obligations toward civilians there, including respect for their persons and honour, and protection against violence or threats.[46]

Non-international Armed Conflict. The LOAC rules applicable to non-international armed conflicts are not nearly as comprehensive as for international armed conflicts. Only one provision in each of the four Geneva Conventions of 1949 deals with conflicts that are not international. That provision, known as Common Article 3, applies where a non-international conflict occurs in the territory of one of the high contracting parties. It reads:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovementioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Thus, if a secessionist movement in State X launched an armed struggle to form an independent state out of part of the territory of State X. Common Article 3 would apply. This article does not refer to "protected persons," but it does provide for a minimum level of humane treatment for civilians, and prohibits their murder, mutilation, cruel treatment and torture. However, some of the specific detailed protections accorded to "protected persons" under Geneva Conventions I to IV in an international conflict, such as protection against deportation, would not apply in State X.

Because Common Article 3 provides less protection to people in non-international armed conflicts than is provided to them under the other articles in international armed conflicts, many states agreed in 1977 on the Additional Protocol II, which "develops and supplements"[47] Common Article 3 of the 1949 Geneva Conventions. However, that Protocol purports to apply only to conflicts between a high contracting state and, in a typical case, a faction of its armed forces or an armed opposition group.[48] Nevertheless, in the conflicts to which it does apply, Additional Protocol II extends the protection available to civilians beyond that provided

by Common Article 3, for example by specifying detailed fundamental guarantees in article 4 which reads in part:

Article 4 - Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

   (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
   (b) collective punishments;
   (c) taking of hostages;
   (d) acts of terrorism;
   (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
   (f) slavery and the slave trade in all their forms;
   (g) pillage;
   (h) threats to commits any of the foregoing acts.

Returning to the example of the secessionist war in State X, if the movement had the requisite responsible command, and it controlled territory and met the other conditions set out in article 1(1) of Protocol II, then both the forces of the successionist movement and the armed forces of State X would be entitled to protection and subject to obligations under Protocol II.

LOAC and UN-Type Military Operations (UN Military Missions or UN-Approved National Military Missions)

An important question is whether the LOAC applies to UN military operations or UN approved or requested military operations by national forces.[49] The answer to that question has a direct bearing on important

subsidiary questions. What standards must Canadian troops be taught to respect while in foreign countries in order to comply with Canada's international obligations under the LOAC? How much force can peacekeepers use to defend themselves or their mission? How can that be clearly reflected in Rules of Engagement? Could the use of force in certain circumstances constitute a grave breach of the Geneva Conventions? These issues are not academic. A failure to comply with applicable LOAC could result in CF members being tried by a Canadian court, a foreign national court or an international tribunal on criminal charges or for war crimes, even if the members concerned had not been ordered by the CF to comply. A failure to comply could also oblige Canada to make reparations to the state whose nationals were injured or killed by the actions of CF members.

The problem can be stated as follows. Most of the armed conflict operational rules of the Geneva Conventions bind a state party to them only when the state is *party* to an armed conflict. However, a state contributing a national contingent to a UN military mission whether it be a peacekeeping, peace making or peace enforcing operation in respect of an armed conflict is not a *party* to the conflict within the meaning of the Hague and Geneva Conventions. Furthermore, as the UN is not a state and as the Geneva Conventions are expressly only open to accession by states, the UN cannot *become* a party to them.[50] It is, therefore, difficult to argue or conclude, *on a strict reading of the Conventions*, that they apply directly to the UN or a UN armed force of peacekeepers.[51] As Hoffman has written:

> From the earliest days of the UN's interest in peace enforcement, however, it has been argued that military operations conducted under the authority of Chapter VII of the UN Charter are not covered by the Hague or Geneva Conventions. Because the UN is not a state, it is ineligible to adopt those treaties. It follows that military forces are not traditional parties to a conflict when operating under UN Security Council resolutions based on Chapter VII. Forces committed to a Chapter VII operation do not take sides in any conflict; in principle they are intervening in a state or region to end a threat to international peace and security. Because they are not parties to a conflict, they are held not to have a vested interest in how it ends. Consequently, military forces committed to peace enforcement under Chapter VII are not covered by the law of war. These arguments have been raised as an objection to applying the law of war in any peace enforcement operation....
>
> Consequently, nothing in the law of war guides or empowers the commander in peace enforcement operations. As operations in Somalia and Bosnia demonstrate, that commander therefore has:

- no power to detain or try common criminals, members of opposing forces, or other individuals that pose a security risk to the nation or the intervention force;
- no authority to regulate any aspect of civil life for the good of the population of the country; and
- no privileged combatant status to protect wounded or captured peace enforcers.[52]

On the other hand, another expert in the field has stated:

> The UN is not a State and does not possess the juridical and administrative powers necessary to independently discharge many of the obligations provided for under international humanitarian law, but it must find ways of enforcing compliance, when necessary, by contributing states. This will be easier in the case of peace-keeping operations and enforcement actions taken under Chapter VII than for "authorized" actions when there is no UN Command and control and where the residual role, if any, of the Security Council and the UN is unclear. The preliminary task of defining and clarifying what is meant by the "spirit and principles" of international humanitarian law and determining more precisely what provisions of international humanitarian law are applicable to UN forces is already underway through a series of informal meetings of experts convened by the ICRC [International Committee of the Red Cross].[53]

In any event, it is illogical that combatants who are trying to kill each other in an armed conflict are subject to the LOAC when they are acting as members of a national armed forces, whereas members of armed forces in the same armed conflict acting as UN peacekeepers are exempt from the obligation to respect the rights of protected persons. As the head of Legal Division ICRC has stated, "it would be strange in the very least were national contingents to be bound by less stringent rules when operating under United Nations command than under national command."[54] This view is buttressed by the argument that customary law has evolved so that minimum standards of conduct — for example, the prohibition against torture and other harming of those *hors de combat* — apply in all cases of armed conflict, and to all those involved in armed conflict. By reasonable extension, these same rules, as a form of customary obligation, should bind peacekeepers.

In a persuasive paper, Professor Emanuelli points out that:

Il ressort des développements précédents que le droit international humanitaire est applicable aux forces des Nations Unies. En effet, l'Organisation des Nations Unies est titulaire de droits et d'obligations créés par le droit international humanitaire, les forces des Nations Unies sont des organes subsidiaires de l'Organisation, et les affrontements auxquels ces forces participent sont assimilables à un conflit armé par analogie....

Dans la mesure où les forces des Nations Unies affrontent d'autres forces armées organisées, il semble que les règles du droit international humanitaire qui sont applicables à ces forces soient celles concernant les conflits armés internationaux....

Dans une large mesure, les règles coutumières qui sont codifiées par les Conventions de Genève et par le Protocole I s'appliquent *mutatis mutandis* aux forces des Nations Unies. Cependant, certaines de ces règles sont difficilement transposables aux affrontements armés impliquant des forces des Nations Unies dans la mesure où elles sont formulées en vue de leur application par des États. Le CICR s'emploie actuellement à définir le contenu des règles du droit international humanitaire d'origine coutumière qui sont applicables aux forces des Nations Unies....

D'autre part, dans la mesure où ils agissent en tant qu'organes subsidiaires de l'Organisation des Nations Unies et non en tant qu'organes étatiques, les contingents nationaux mis à la disposition de l'Organisation sont régis par les règles du droit international humanitaire applicables à celle-ci et non par les règles qui lient l'État fournisseur.[55]

However, the lack of agreement about what constitutes minimum standards makes it difficult to rely on the customary law argument. Thus, uncertainty remains about the direct application and enforceability of the customary LOAC to and by a UN armed force of peacekeepers or peace makers in a Somalia UNOSOM type of operation.

Fortunately, this uncertainty has been reduced in part by the increased use of a standard written agreement between each troop-contributing state and the UN that the UN asks the state to sign.[56] These agreements seek to ensure that troops of contributing states at least abide by the principles and spirit of the Geneva Conventions.

The issue remains whether the LOAC (particularly the 1949 Geneva Conventions and the 1997 Additional Protocols) applied to the CF in Somalia.

DID THE LOAC APPLY TO THE CF IN SOMALIA?

The Geneva Conventions Act

The Parliament of Canada gave legal effect in Canada to the 1949 Geneva Conventions by enacting the *Geneva Conventions Act* in 1965.[57] This Act, as amended, approves and incorporates by reference the whole of the 1949 Geneva Conventions and the two 1977 Protocols which form schedules to the Act. Part I of the Act states that grave breaches of the Conventions or Protocols are indictable offences under Canadian law, whether committed in or outside Canada. Any person committing a grave breach that causes death is liable to imprisonment for life. In any other case, a person committing a grave breach is liable to imprisonment for a term not exceeding 14 years.[58]

The *Geneva Conventions Act* states further that the prosecution may commence any place in Canada, whether or not a person charged with such an offence is in Canada.[59]

The Act also empowers the Minister of National Defence to make regulations governing the status of prisoners of war in Canadian hands.[60] The Act itself does not say in what situations, e.g., what armed conflicts, the Act will apply. It leaves that to the wording of the Conventions and Protocols that are attached as schedules to the Act. However, section 9 of the Act states:

> A certificate issued by or under the authority of the Secretary of State for External Affairs stating that at a certain time a state of war or of international or noninternational armed conflict existed between the states named therein or in any state named therein is admissible in evidence in any proceedings for an offence referred to in this Act without proof of the signature or authority of the person appearing to have issued it and is proof of the facts so stated.

Canadian Forces Regulations, Orders and Instructions

No authority in the CF, DND or the Canadian government can exempt, from the application of the LOAC, any armed conflict or military occupation of territory if the LOAC applies under international law, i.e., under the wording of conventions binding on Canada because Canada is party to them, or binding on Canada by customary international law. To put it simply, every CF member, like any other person anywhere in the world, is subject to the LOAC whether CF orders say so or not. Any CF

member may be tried by the courts of any state, and possibly by a special international tribunal, for grave breaches of the Geneva Conventions or Protocols.

On the other hand, Canada can extend the applicability of the LOAC by ordering CF members to comply with or implement all or parts of the LOAC in a situation where the LOAC would not or may not otherwise apply. There is some evidence that that was intended in regard to the way in which members of the CF were to treat all civilians,[61] and, in particular to the CF deployment to Somalia.[62] Whether such military instructions would be sufficient under Canadian law to make all Somali civilians "protected persons" under the Fourth 1949 Geneva Convention and Protocol I is not clear. If Somali civilians did become "protected persons," the three-year limitation period set out in the *National Defence Act*[63] would not apply, and CF service tribunals could try members of the CF for any alleged grave breaches against these persons no matter how much time had elapsed since the alleged breach.

The views of Col David Hurley, who commanded 1 Royal Australian Regiment in Somalia[64] may shed some light on which legal norms applied to the UNITAF mission in Somalia. In a 1994 article, he concluded that the situation in Somalia was not an international or non-international armed conflict within the established conventions and treaties. He noted, however, that some of these instruments contained a substitute principle — the Martens clause — "which holds that in cases not explicitly covered by treaty law, civilian persons and combatants remain under the protection and authority of the principles of international law."[65] In Col Hurley's view, this principle applied to operations in Somalia.

Another Australian officer, Maj Kelly, goes further, presenting arguments as to why the provisions in the Hague Rules, the Fourth Geneva Convention, and customary law concerning an "occupying power," could have applied in Somalia,[66] — even though the lead contingent, the United States, was "adamant that this [Fourth] Convention did not apply to the circumstances of the UNITAF deployment to Somalia."[67] The U.S. forces in Somalia were, nevertheless, clearly ordered to apply the humanitarian provisions of Common Article 3 of the 1949 Geneva Conventions.[68]

Indeed, some senior members of the CF testified at the Commission's hearings that they thought the LOAC or, at least, the principles of the Geneva Conventions applied to the CF in Somalia.[69] The opposite view was expressed by the Court Martial Appeal Court (CMAC) in the case of Pte Brocklebank.[70] Whether or not the CMAC reached the right conclusion in that regard, it appears that it was arrived at on the basis of

misinformation. Because of the importance of that judgment as far as the applicability of LOAC to the CF is concerned, it warrants close examination here.

R. v. Brocklebank

First, it should be observed that the judgment mentioned several times that the mission of the CF in Somalia was a "peacekeeping mission."[71] It is well established that what started out as the UNOSOM peacekeeping mission under Chapter VI of the UN Charter was transformed into a national (albeit a coalition of nations) UNITAF peace-making or peace-enforcing mission authorized by the Security Council under Chapter VII of the UN Charter. The conduct in question of Pte Brocklebank occurred when his unit was part of the UNITAF mission or operation.

Second, on page 26 of the judgment of Décary J.A. for the majority, the statement appears that "There is no evidence that there was...an armed conflict." In the common ordinary meaning of the expression, there surely was available information — although apparently not presented in evidence — of "armed conflict" in Somalia at the relevant time. Not only was it noted in reports of the SecretaryGeneral of the UN to the Security Council in 1992 and 1993,[72] but hundreds of shooting deaths of members of other contingents of UNITAF and Somalis attested to serious and persistent armed conflict. In any event, one has to question the conclusion expressed in footnote 32 (on page 27 of the judgment) that "without such evidence (i.e. certificate issued by or under authority of Secretary of State for External Affairs) the Convention cannot be said to be applicable and it follows that the Unit Guide to that Convention cannot apply either." In that regard, as quoted above, the *Geneva Conventions Act,* section 9, simply states that such a certificate is admissible in evidence — not that it is the *only* evidence by which to prove the applicability of the Convention.

Third, the judgment of Décary J.A. gives the impression that "exposed to mistreatment" or being an "inhabitant" is a condition precedent to being a "person protected by the Convention," yet relevant articles 4 and 27 of the Fourth Geneva Convention impose no such conditions. To be a "protected person," as defined in article 4 and therefore "to be protected against all acts of violence" under article 27, a person need merely be "in any manner whatsoever...in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." As to the meaning of the expression "in the hands of," the

authoritative Pictet states that the expression "is used in an extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a party to the conflict or in occupied territory, implies that one is in the power or 'hands' of the Occupying Power."[73] Hence, if the CF was "a party to the conflict" or "occupying" part of Somalia within the meaning of the Fourth Convention the only persons in the area occupied by the Canadian Airborne Battle Group (CARBG) who would *not* have been "protected persons" were those described in the second paragraph of article 4 of the Fourth Geneva Convention which reads:

> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

At page 27 of the judgment of Décary J.A. there is a quote from the "Commentary on Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949" that the Fourth Geneva Convention concerning civilians "*only* protects civilians against arbitrary enemy action...." Later, on the same page, it is stated that "The 1977 Protocol I...article 51...*only* affords civilians 'general protection against dangers of military operations'"[74] leaving the false impression that that is the only protection civilians can claim under Protocol I. What is not mentioned is that those references are dealing only with Part II of the Fourth Geneva Convention, and that Part II was drafted knowing that Part III of the Convention includes relevant articles of the Fourth Geneva Convention that protect civilians from any type of mistreatment — not just war or war-like hostilities, such as aerial bombings or military battles covered in Part II. In addition to article 51 of the Protocol I, the judgment of Décary J.A. mentions article 13 of the Convention and article 13 of Protocol II that are concerned with the protection of civilians from exposure to danger and violence in the course of hostilities such as bombing or strafing by aircraft, artillery bombardment, etc., during military operations. But there is no articulation in the judgment of Décary J.A. that articles 4 and 27 of the Fourth Geneva Convention impose on all armed forces the obligation to protect civilians from *all forms* of violence. The majority of the CMAC reached a conclusion, that the *Unit Guide to the Geneva Convention* could not have been applicable to the Somalia operation *"for the simple reason*

that the Civilian Convention itself does not apply." That conclusion appears to have been based, at least partly on the wrong provisions of the Fourth Geneva Convention and Protocols.

The foregoing raises the question as to why there was apparently no evidence before the court that:

- The UNITAF mission was an armed non-consensual military operation to *enforce* peace under UN Charter Chapter VII, and *not* a "*peacekeeping*" mission under Chapter VI of UN Charter.
- That Articles 4 and 27 of the Fourth Geneva Convention were the most relevant articles in regard to the personal attacks on Shidane Arone by members of the CF.

Perhaps the members of the military court-martial trying Pte Brocklebank were aware of those points and hence there was no need to have evidence in respect of them introduced in evidence at his trial, in which case the transcript of the court-martial proceedings would not reflect them for the benefit *inter alia* of the CMAC. In any event, the further question arises whether the CMAC would have come to a different conclusion as to the possible applicability of the Fourth Geneva Convention, and therefore to the applicability of the *Unit Guide to the Geneva Convention,* if the CMAC had been properly informed.

Regardless of the foregoing, it is hoped that the implicit suggestions of Décary J.A. on page 31 of the Reasons for Judgment will be acted upon. It reads:

> [I]t remains open to the Chief of Defence Staff to define in more explicit terms the standards of conduct expected of soldiers in respect of prisoners who are in Canadian Forces custody. It is open to the Chief of Defence Staff to specify that these standards apply equally in time of war as in time of peace, to impose a military duty on Canadian Forces members either to report or take reasonable steps to prevent or arrest the abuse of prisoners not in their charge and to ensure that Canadian Forces members receive proper instructions not only during their general training but also prior to their departure on specific missions.

The Unit Guide to the Geneva Convention

Whether or not the CMAC was right in its conclusion that the *Unit Guide to the Geneva Convention* did not obligate members of the CF to apply those Conventions in Somalia, the Guide itself should be revised to clarify

what the Geneva Conventions provide. For example, page 5-1, paragraph 2 could be misleading. It states:

> The Convention [Fourth Convention] does not meet the requirement of protecting all civilians to this extent since only Part II is applicable to the whole civilian population. However, the provisions outlined in this chapter should be regarded as the minimum standard of treatment of any civilians with whom our armed forces come in contact.[75]

It is the first sentence quoted above that is misleading. It is true that Part II of the Fourth Convention applies to all civilians, but Part II protects them from only exposure to attacks in warfare, battles, bombings, etc. The paragraph should be amended to emphasize that Part III of the Fourth Convention is far broader in scope than Part II as it protects almost all civilians from any kind of physical or mental assault anywhere in territory occupied by foreign troops. By virtue of the wide definition of "protected persons" in article 4 of Part I, *the only persons who are not protected are civilians who are nationals of the state whose troops are occupying the territory, nationals of co-belligerents of the occupying state, nationals of states not bound by the Convention and certain nationals of neutral states*. Hence, if the Fourth Geneva Convention was applicable in 1992-93 to the areas of Somalia controlled by the CF, then all civilians without exception in that area were to be protected under Part II of the Fourth Geneva Convention against exposure to or attacks of warfare (e.g., military battles), and all civilians in that area *except Canadian nationals* (and a relatively few other nationals as described in article 4) were to be protected under Part III of the Fourth Geneva Convention against any physical or mental assault, torture etc. Article 27 in Part III reads:

> Article 27. - TREATMENT: GENERAL OBSERVATIONS
> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
>
> Women shall be especially protected against any attack of their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
>
> Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to

the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

It follows that the despicable torture and killing of the Somali civilian, Shidane Arone, on March 16-17, 1993 could not have been a contravention of Part II of the Fourth Geneva Convention, but was clearly a contravention of Part III of the Fourth Geneva Convention, in particular article 27, if the CF had been obligated to apply the Fourth Geneva Convention.

As we have seen, under international law Canada (i.e., the CF) would have been so obligated if it was party to an armed conflict in Somalia or if the presence of the CF in Somalia constituted a military "occupation" of territory within the meaning of the 1949 Fourth Geneva Convention concerning civilians. But if, in law, the conflict in Somalia was not an "armed conflict" and there was no "occupation of territory" within the meaning of the Fourth Geneva Convention, could the CF or, perhaps more importantly, members of the CF have been legally bound by regulations or orders under the *National Defence Act* to apply the Conventions? In other words, can the CF (lawfully) constitutionally be obligated to comply with the LOAC when it is not, by its conventional terms, applicable or clearly applicable? An examination of that broad question is not within the scope of this study. But some comments may be useful. As noted above, the CMAC expressed the view that it was open to the Chief of Defence Staff (CDS) to specify standards of treatment to be accorded prisoners in CF custody. But would a command or order by the CDS to the CJFS (including CARBG) that it was to protect civilians *as prescribed in the 1949 Geneva Convention on Civilians and 1977 Protocols*, be a lawful command or order if the Convention was not applicable because there was no "armed conflict" *or* "occupation" within the meaning of the Convention? In other words, could the CDS lawfully require CF soldiers to do what Parliament has not required them to do? Parliament "approved" the 1949 Geneva Conventions and 1977 Protocols as agreed by Canada.[76] Parliament thereby approved the implementation by Canada of the Convention and Protocols *in the circumstances of international armed conflicts or occupation of territory, or non-international armed conflicts to which the Conventions and Protocols by their wording are applicable.* However, Parliament has not prescribed that CF members shall implement (or even need implement) the Conventions and Protocols in situations

or circumstances other than armed conflicts or occupation of territory as understood in the law of armed conflict.

Even if the armed fighting between the Somali clans and between the armed clans and coalition, principally U.S, armed forces, *could be said* to be neither "an international armed conflict." nor a "non-international armed conflict," I tend to think that the CDS could lawfully issue such an order[77] — at least to the extent that the CF was to apply the humanitarian principles of the 1949 Conventions and the 1977 Protocols. Such an order could hardly be contrary to the international LOAC. As far as Canadian law is concerned, such an order would seem to represent no more than an incorporation by reference into a lawful command or order of universally accepted humanitarian standards of conduct for military forces.

There remains a question as to the effect, on the status of citizens of foreign territory controlled by the CF, of an order by the CDS or a commander of a unit or other element of the CF that subordinates were to comply with the 1949 Geneva Conventions in a situation where the Conventions would not otherwise be applicable. Would the citizens be "protected persons" under article 4 of the Fourth Geneva Convention for the purposes of classifying an aggravated assault on one of them as an offence "related to a grave breach of the Geneva Convention" such as to bring the offence within the exception to the three year trial rule under section 69 of the NDA? It is difficult to say. But even if such an order by the CDS or another commander in the CF did not have any legal effect in international law or national law on the status of people in other countries, it could only be helpful to everyone concerned, that all members of the CF be clearly instructed to abide by the LOAC humanitarian standards of conduct in their relations with all peoples when engaged in military missions or operations.

CHAPTER THREE

Rules of Engagement

DEFINITIONS

Early this morning Sgt Macauley had contact with a technical — a Toyota ½ t [half tonne] mounting a machine gun, probably a ....Sgt Macauley had the machinegunner in his sights & was prepared to seize the vehicle. Rules of engagement however limited our actions to observation only. We should have had our first kill![1]

This quotation is taken from the personal diary of Maj Anthony Seward of the CAR. The diary gives a description of an incident involving members of the CF, and describes in a way the essence of the ROE. The rules are effectively orders which determine when, where, against whom, in what circumstances and how force can and should be used.[2]

Current doctrine defines ROE as being:

...directions and orders regarding the use of force by Canadian forces in domestic and international operations in peacetime, periods of tension and armed conflict. They constitute *lawful commands* and are designed to remove any legal or semantic ambiguity that could lead a commander to violate national policy by inadvertently underreacting or overreacting to an action by foreign forces....ROE serve as a mechanism for guiding and controlling the use of force...[3]

Since the ROE, like any other military orders or commands could, possibly, be unlawful, it is presumed that the word "lawful" in the quotation was unintentionally used when the word "official" was intended.

In another document presented to the Commission, ROE are defined in the following way: "Directions issued by competent military authority which delineate the circumstances and limitations within which armed force may be applied to achieve military objectives in furtherance of national policy."[4]

In a recent CMAC decision, Hugessen J.A. pointed out that the text of the ROE for Operation Deliverance stated that the ROE "constitute orders to Commanders and Commanding Officers."[5] Capt (N) McMillan stated at the second trial of LCol (ret) Mathieu: "The rules of engagement, as prepared for any operation, are orders in themselves for the control and use of force. In as such [sic], they are the means to provide the directive necessary to the commanding officers with respect to that control for the use of force."[6] To put it succinctly, ROE are orders about the use of force.[7]

Since ROE are orders, soldiers must obey them unless they are manifestly unlawful.[8] And, since disobedience of a lawful order constitutes an offence against the Code of Service Discipline, it follows that, if a person knowingly exceeds the ROE limitations on the use of force, that person can be charged with contravening a lawful order.[9] In that connection, the case of LCol Mathieu could be mentioned. He was accused of negligently performing a military duty imposed on him contrary to section 124 of the *National Defence Act*. It was alleged in the particulars of the charge that "he failed to observe the Canadian rules of engagement issued for Operation Deliverance, as it was his duty to do, by issuing an order to his subordinates to shoot at the looters/thieves of equipment fleeing from Canadian camps." [10]

LCdr Phillips, a legal officer in the Canadian Forces, has explained that ROE prevent both underreaction as well as overreaction, and that they also protect commanders:

> The most important military aspect of ROE is establishing limits on the use of force. This applies both to the commander as well as to his or her personnel....While ROE mainly are restrictive to prevent overreaction, they also can prevent underreaction if the ROE specify permissible responses to expected actions by an adversary....Rules of engagement also will protect the commander if clear directions on the use of force are given to the troops.[11]

Recent CF doctrine mentions four factors that influence the formulation of ROE:

a. *Legal Prescriptions*. Any use of force must comply with both Canadian domestic law and or international law....
b. *Political and Policy Considerations*. To secure and protect national interests at home and abroad, the Government of Canada establishes policies, goals and objectives....

c. *Diplomatic Considerations.* During international operations and, in particular, during combined operations, the overall military objectives and the use of force will be influenced by the collective objective of the alliance or coalition....
d. *Operational Requirements.* The use of force will also depend on current and future operational considerations.[12]

On the matter of legal prescriptions, the same doctrinal publication states:

Although Canadian domestic laws and international law are, in many ways, compatible or complementary, there are areas where they may conflict and, depending on the operation and the authorizations of the Canadian government, elements of international law or UN Security Council resolutions may take precedence over Canadian domestic law.[13]

When Canada decided to participate in UNITAF the Canadian Forces had, in drafting its ROE, to take into account the matter of compatibility of Canadian ROE with ROE of the other armed forces of participating states, in particular the United States, the major participant.[14] The CF adopted the position that "[f]or OP DELIVERANCE, being a coalition operation, the Canadian ROE would...have to be compatible with those used by other coalition partners, especially the United States."[15]

HISTORY

Mark Martins explains that since the Korean war, three factors have explained the necessity to issue ROE in the United States:

[s]ince that conflict three factors have converged, forcing senior American leaders to issue ROE to harness military action to political ends more completely. First, weapons of mass destruction have been available to competing sovereign states, creating the specter of nuclear holocaust and the incentive to prevent minor incidents and conflicts from escalating. Second, technological advances in communications and information processing have vastly increased a central authority's ability to direct the actions of subordinates...Third, an aggressive and skeptical [sic] news media has emerged, willing to question the use of military force....[16]

During Operation Deliverance, which was the name of the Canadian military operation in Somalia during 1992-93, no joint (i.e., army, navy and air force) ROE system existed in the Canadian Forces.

In a brief for the Commission, the CF explained that, until the early 1990s, there was a ROE system for the navy, one for the air force but none for army:

Canada adopted the NATO maritime ROE system for its national maritime ROE in the late 1970's. Canada, through NORAD, also adopted a separate ROE system for its fighter aircraft. Canada's Land Force Command, although using the term ROE throughout the 1970's 80's and early 90's, did not develop a standing ROE system or architecture. Rather, it has employed ad hoc ROE on a variety of domestic and international missions and operations. Although these three approaches to ROE were sufficient for single service operations, they were incompatible during joint operations.[17]

For purposes of comparing the CF Land Force Command and the U.S. Army in that regard, it is noted that:

While America's air and sea forces developed ROE for tense encounters that could occur at any time and then escalate rapidly into nuclear war, the ground component trained for mid-intensity conventional war developed its ROE for every other type of operation on an "as needed" basis. Also, while aircraft and ships on duty around the clock worldwide could conceivably be expected to fire on a Soviet plane or vessel purely in national self-defense, these scenarios were unlikely to confront land forces, whose main defensive concerns centered on individuals or units.[18]

The same brief presented to the Commission during its policy hearings also explains that:

As a result of the post operations analysis and lessons learned from the Gulf War in 1991, Canada began developing a joint ROE architecture which could be used with equal efficiency in single service, joint or combined operations. This joint ROE system has been used in present CF domestic and international operations since 1994 and the corresponding publication (Use of Force in CF, Joint and Combined Operations) which formalizes this process is expected to be approved by the CDS in June 1995.[19]

The publication referred to in that brief is the *Advance Copy of the Use of Force in CF, Joint and Combined Operations (English)* published in two volumes[20] and issued by the CDS on April 13, 1995. This is an important work on the subject of use of force by the CF.

The first volume deals with:

the concepts, principles and direction on the use of force in domestic and international operations, and is divided into four chapters. Chapter 1 discusses the use of force and law and deals with general principles and legal constraints on the use of force. Chapter 2 deals with controlling the use of military force and introduces the notions of selfdefence and ROE, which will be applied in terms of domestic and international operations in chapters 3 and 4, respectively. Finally, annex A provides guidance on the handling of evidence and annex B deals with the administrative dimension of the ROE.[21]

The second volume "provides the numbered ROE menus and message formats for requesting, authorizing and implementing ROE."[22] The utility of that volume is demonstrated by explaining that the "ROE authorized for a JF [Joint Force] may be taken from the numbered menu of supplementary ROE measures contained in volume 2...or may be developed specifically for the particular operation."[23]

Chapter 5 of the *Joint Doctrine for Canadian Forces Joint and Combined Operations* issued in its present form on September 15, 1995[24] also deals with ROE. It is a more concise version of the publication mentioned above, *Advance Copy of the Use of Force in CF, Joint and Combined Operations (English).*

To conclude these remarks on ROE, it is emphasized that ROE are not law or laws in themselves and, to be lawful, they must conform to applicable national and international law — particularly the law of armed conflict.

CHAPTER FOUR

Double Jeopardy

GENERAL

When a person is subject to the criminal laws of two states in respect of a particular act or omission, or is liable to be tried on a criminal charge by the courts of two states for that act or omission, he or she is placed in what is commonly referred to as "double jeopardy," i.e., put at risk of being punished twice for the same offence. The subject of double jeopardy has been quite thoroughly examined in many legal works.[1] All this study will attempt to do on the subject is to mention principal legal provisions that may be relevant to the Somalia deployment.

As mentioned earlier in this study, members of the CF, *in respect of their acts or omissions in Somalia*:

- may have been subject to the *Somali Penal Code*, and may still be subject to trial by Somali courts;
- were subject to the CF Code of Service Discipline (which includes all military offences and also all offences under any Canadian federal statute committed in Canada or outside Canada[2] and offences under Somali law[3]); and they could be tried by CF service tribunals for *any* offence under that Code for up to three years from the date of commission of the offence,[4] and for a few specified offences[5] without any time limitation;
- were subject to trial by civil courts in Canada for offences committed outside Canada;[6] and
- may have been subject to the 1949 Fourth Geneva Convention, and hence to the provisions of it creating the international offences of "grave breaches" of the Convention for which an accused person could be tried by the courts of literally any state in the world.[7]

Given the foregoing, on the face of it, while in Somalia, members of the CF appear to have been placed in double, triple and possibly quadruple jeopardy as regards trials by CF service tribunals, Canadian civil courts, Somali courts and the courts of other states — unless applicable laws prevent such possibilities. Fortunately, there are some such laws.

TRIALS BY BOTH A CF SERVICE TRIBUNAL AND A CIVIL COURT IN CANADA

First, as regards the possibility of double jeopardy arising as a result of an accused being tried by both a CF service tribunal and a civil court in Canada, section 11(h) of the *Canadian Charter of Rights and Freedoms* provides that:

> 11. Any person charged with an offence has the right...
>
> (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.

Furthermore, section 66 of the NDA provides that:

> (1) Where, while subject to the Code of Service Discipline in respect of an offence, or where, while liable to be charged, dealt with and tried under that Code in respect of an offence, a person
>
> (a) has been charged with having committed that offence and the charge has been dismissed,
> (b) has been found not guilty by a service tribunal, civil court[8] or court of a foreign state on a charge of having committed that offence, or
> (c) has been found guilty by a service tribunal, civil court or court of a foreign state on a charge of having committed that offence and has been punished in accordance with the sentence,
>
> that person may not be tried or tried again in respect of that offence or any other substantially similar offence arising out of the facts that gave rise to the offence.

As regards offences charged under the *Criminal Code* of Canada, section 607 states in part:

(1) An accused may plead the special pleas of

(a) *autrefois acquit*,
(b) *autrefois convict*, and
(c) pardon.

...

(5) Where an accused pleads *autrefois acquit* or *autrefois convict*, it is sufficient if he

(a) states that he has been lawfully acquitted, convicted or discharged under subsection 736(1), as the case may be, of the offence charged in the count to which the plea relates; and
(b) indicates the time and place of the acquittal, conviction or discharge under subsection 736(1).

TRIAL BY SOMALI COURT AFTER TRIAL BY CF SERVICE TRIBUNAL OR CIVIL COURT IN CANADA

As regards the possibility of double jeopardy arising were a Somali court to try a person charged with an offence for which that person had already been tried by a CF service tribunal or a civil court in Canada, the following points are important.

Both Canada and Somalia are parties to the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on December 16, 1996.[9] Article 14, paragraph 7, of the Covenant reads:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

It appears that article 9 of the *Somali Penal Code* implements, at least partially, Somalia's Covenant obligation. Article 9 reads in part:

Article 9 Cases in Which Criminal Proceedings Cannot Be Instituted

Apart from the cases specified in Article 7, criminal proceedings for a crime committed abroad cannot be instituted

(a) against a person who was finally acquitted abroad of the same crime, or
(b) against a person who, abroad, has been convicted of a crime and has served the sentence prescribed therefor.[10]

However, since that article applies only to offences committed *outside* Somalia, it would not apply to acts or omissions by members of the CF *in* Somalia. In regard to the latter, article 10(1)(b) would seem to be the relevant provision. Subject to a requirement that there be an extradition treaty between the countries concerned or a special request by the Somali Minister of Grace and Justice, article 10 "Recognition of Foreign Penal Judgments" reads in part: "1. A foreign penal judgment pronounced in respect of a crime may be recognized:...(b) to establish any other penal consequence of a conviction."[11] Thus chances are that the Somali courts would not try a member of the CF for an offence for which the member was previously tried by a court in Canada — military or civil.

TRIAL BY CF SERVICE TRIBUNAL AFTER TRIAL BY SOMALI COURT

In the unlikely event that a Somali court or the court of any other country were to try a member of the CF for an offence, and acquit or convict the member, any subsequent prosecution of the member, for the same offence, by a CF service tribunal would no doubt be challenged by the accused under section 11(h) of the Charter and section 66 of the *National Defence Act.*

TRIAL BY CIVIL COURT IN CANADA AFTER TRIAL BY SOMALI COURT OR COURT OF ANY OTHER COUNTRY

Any prosecution of a CF member in a civil court in Canada, for the same offence of which he had been convicted or acquitted by a Somali court, would no doubt also be challenged under section 11(h) of the Charter. In addition, the accused, depending on the nature of the offence, might invoke section 7(6) of the *Criminal Code* of Canada which applies *inter alia* to war crimes and torture. Section 7(6) reads:

Where a person is alleged to have committed an act or omission that is an offence by virtue of this section and that person has been tried and dealt with outside Canada in respect of the offence in such a manner that, if that person had been tried and dealt with in Canada, he would be able to plead *autrefois acquit*,

autrefois convict or pardon, that person shall be deemed to have been so tried and dealt with in Canada.

The latest edition of *Martin's Annual Criminal Code* summarizes this section as follows:

To preserve defences otherwise available if the accused had been tried elsewhere, [for any of the offences specified in section 7] s. 7(6) makes the *special pleas* of *autrefois acquit, convict* and pardon applicable. This means that, if an accused had previously been tried and acquitted, convicted or pardoned elsewhere in connection with the same conduct which led to the Canadian prosecution, the accused could rely on the special plea as if the prior trial had been in Canada.[12]

However, there are limits on the extent to which a trial, by a foreign court, of an offence will block a subsequent trial by a court in Canada of the same offence. In this connection Canadian *Criminal Code* section 607(6) reads:

A person who is alleged to have committed an act or omission outside Canada that is an offence in Canada by virtue of any of subsections 7(2) to (3.4) or subsection 7(3.7) or (3.71), and in respect of which that person has been tried and convicted outside Canada, may not plead *autrefois convict* with respect to a count that charges that offence if

(a) at the trial outside Canada the person was not present and was not represented by counsel acting under the person's instructions, and
(b) the person was not punished in accordance with the sentence imposed on conviction in respect of the act or omission,

notwithstanding that the person is deemed by virtue of subsection 7(6) to have been tried and convicted in Canada in respect of the act or omission.

Thus, the extent to which a person is protected against double jeopardy by the courts of two countries depends on applicable international treaties and the provisions of the constitutional and criminal laws of the countries concerned. It also depends on the actual offences charged against the accused in the two jurisdictions; for example in *R.* v. *Van Rassel,*[13] the Supreme Court of Canada did not allow a plea of *autrefois acquit* where

the plea was based on an acquittal by a court in the United States on what the Supreme Court of Canada ruled was not the same charge as that later tried by a court in Canada.

Finally, on this subject, it should be noted that members of the CF while in other NATO countries, e.g., Belgium, Germany, United Kingdom, United States are protected by paragraph 8 of article VII of the NATO SOFA which reads:

> Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.

Given that Parliament has made members of the CF outside Canada subject to Canadian criminal law, thereby putting them in a position where they are subject to the criminal law of at least two countries, (except perhaps on the high seas or in certain aircraft), Canada should ensure that whenever possible a provision similiar to article VII(8) of the NATO SOFA is agreed between Canada and other countries to which members of the CF are sent or likely to be sent.

Conclusions

1. As far as *applicable law* is concerned, members of the Canadian Forces while serving in Somalia in 1992 and/or 1993:

(a) were *probably* subject to the criminal law of Somalia, notwithstanding that the Somali criminal justice system was not then functioning;

(b) were *clearly* subject to the criminal law of Canada, in that they could be charged with any offence under any statute of Canada;

(c) were *clearly* subject to the Code of Service Discipline under the *National Defence Act*; and

(d) *possibly* were subject to some of the rules of the international Law of Armed Conflict, namely the humanitarian rules in the 1949 Fourth Geneva Convention for the protection of civilians and Protocol I or Protocol II.

2. As far as *trial jurisdiction* is concerned:

(a) Although Somali courts were not functioning when the CF were deployed in Somalia, there is a possibility that, if the *Somali Penal Code* was operable at that time (i.e., had not been revoked or repealed), Somali courts may still have jurisdiction to try offences committed against that Code at that time. The exercise of such jurisdiction would, of course, be subject to any prescribed limitations under Somalia law. For example, it could prescribe that a trial could not be held after the lapse of a certain period of time from the date of offence, and/or that the accused must be in Somalia to be lawfully charged and/or tried.

(b) Under section 273 of the *National Defence Act*, civil courts in Canada could still try offences allegedly committed by CF members in Somalia; also under that section, such offences could include offences under the *Criminal Code* or any other Canadian federal statute.

(c) CF service tribunals (essentially courts-martial) could no longer try members of the CF for offences committed more than three years ago except for the types of offences specified in section 69 (2) and (2.1) of the *National Defence Act*.

3. As far as the Law of Armed Conflict is concerned:

(a) The 1949 Geneva Conventions are descriptive of customary international law applicable to the international armed conflicts and/or occupation of territory as described in them.

(b) There is not a consensus among international law experts as to whether the conflicts or presence of armed forces of other states in Somalia in 1992-93 constituted an armed conflict or occupation of territory such as to cause the LOAC to apply to the UNOSOM and UNITAF operations and the national armed forces comprising them in Somalia.

(c) There are persuasive arguments that a United Nations force undertaking peacekeeping, peace-making or peace-enforcing missions, is obligated, at least to the extent possible, to fulfil the humanitarian obligations of an occupying power toward all member of the civilian population of territory occupied by the UN force, in the sense of the territory being controlled militarily and administratively — to a greater or lesser extent — by the UN force, including treating them as "protected persons" as defined in the Fourth Geneva Convention of 1949, and the 1977 Protocol I or II;

(d) The arguments supporting the preceding point are, if anything, stronger where the armed force of peacekeepers, peace makers or peace enforcers comprises the armed forces of states acting in their national capacities, e.g., the coalition forces of UNITAF, rather than as agents of the United Nations, e.g., UNOSOM and, therefore, as instruments of their states that are parties to the Geneva Conventions.

(e) Before and during the UNITAF operations, CF military authorities intended CF personnel in Somalia to comply with the spirit and principles of the 1949 Geneva Conventions, but the extent to which this was conveyed to the CJFS troops is not clear.

(f) In particular, the CF publication, *Unit Guide to the Geneva Convention*, did not, according to the Court Martial Appeal Court, apply to the Canadian Forces in Somalia.

(g) If the 1949 Geneva Conventions, particularly the Fourth Convention, applied under international law to the UNOSOM and/or UNITAF operations in Somalia, the consequences of its applicability would include the following:

(i) former members of UNOSOM or UNITAF could still be charged before, and tried by, the courts of any state in the world (including, of course, civil courts in Canada) for any grave breach of the Conventions; and

(ii) the three –year statutory limitation period (beyond which *CF service tribunals* cannot try members of the CF for criminal or other offences arising out of their conduct in Somalia) would not apply to the trial of charges, such as serious assault or homicide of Somali residents, as such charges would relate to grave breaches of the Geneva Convention.

(h) Regardless whether the 1949 Geneva Conventions were applicable to the armed conflict in Somalia and, therefore, were applicable to the CF operations in Somalia, there is and has been since 1965 a fundamental obligation on the Government of Canada in peacetime as well as in war time to ensure that "the armed fighting forces, the medical personnel and the chaplains" receive instructions about them, and that "the principles thereof...become known to the entire population of Canada." The extent to which such obligation has been fulfilled, for example, the extent to which members of the Canadian Forces were instructed in the Conventions is not within the scope of this study, but will no doubt be addressed in the Report of the Commission of Inquiry.

Recommendations

APPLICABILITY OF LOAC

A regulation should be made by the Governor in Council under section 12 of the *National Defence Act* requiring all members of the Canadian Forces in the course of all missions, operations or deployments outside Canada, to comply with the principles and spirit of the 1949 Geneva Conventions and the 1977 Protocols I and II, including, as a minimum, to comply with the following basic LOAC rules developed by the Judge Advocate General of the CF based on the ICRC fundamental rules:

Soldier's Basic Rules

1. Fight only enemy combatants and attack only military objectives;

2. Employ methods of attack which will achieve your objective with the least amount of incidental civilian damage;

3. Do not attack enemy soldiers who surrender. Disarm them and treat them as prisoners of war;

4. Collect and care for the wounded or sick whether friend or foe;

5. Do not torture, kill or abuse prisoners of war;

6. Treat all civilians humanely;

7. Respect civilian property — looting is prohibited;

8. Respect all cultural objects and places of worship;

9. Respect all persons and objects bearing the Red Cross Red Crescent and Red Lion and Sun;

10. Do not alter your weapons or ammunition to increase suffering;

11. Disobedience of the law of war is a crime and not only dishonours your Country and you but renders you liable to punishment as a war criminal.[1]

DOCTRINE

The *Unit Guide to the Geneva Convention* should be carefully reviewed and be amended as necessary.

TRAINING

(a) Annual refresher instruction and training in the LOAC should be made compulsory for all officers[2] and non-commissioned members of the CF to remind them of their obligations and their rights under the law.

(b) As the Law of Armed Conflict is intrinsically a legal matter as well as an operational matter, there should be established a substantial LOAC section of the JAG Office comprising sufficient legal officers to enable them to:
   (i) prepare and/or monitor and advise on the preparation of LOAC doctrine, and training programs;
   (ii) visit routinely all major operational units in the CF to lecture to all members of them on the basic rules of that law; and
   (iii) most importantly, to participate in regular hands-on training exercises involving application of criminal law, LOAC and ROE.

(c) NDHQ and command HQ should have an LOAC section to monitor and ensure proper LOAC training.

(d) It goes without saying that implementation of recommendations (a), (b) and (c) will require allotment of additional human and other resources — and hence will involve additional expenditure of public funds. But surely there is nothing more intrinsic to the military than being prepared for "armed conflict." It is the military's raison d'être, the essence of its being. Recruits bring with them to the armed forces much knowledge and many skills in many trades and professions so

there is no need for the military to provide substantive education and training regarding them, But that, obviously, is not the case regarding the Law of Armed Conflict. It, therefore, must be taught and practised in the CF not as a catch-up or make-shift or last minute thing, such as hurriedly sending a legal officer to Petawawa to give an hour or two lecture to officers on the LOAC almost on the eve of their departure for Somalia, but as a continuing essential process to ensure that the basic rules are ingrained in the minds of all officers and other ranks at all times. The adoption of that process should avoid, or at least reduce, the chances of members of the CF contravening the LOAC — thus saving lives and careers, and save the costly expenditures involved in investigating, reporting, charging and trying such contraventions — to say nothing of protecting the good name of the Canadian Forces and Canada.

ACCOUNTABILITY

(a) The commander of each command, and the Vice Chief of Defence Staff (VCDS) (as regards all the members of the CF at NDHQ) should be obligated to make an annual written report to the CDS on the status of LOAC education and training in the CF generally and in operational units particularly.

(b) The CDS should be obligated to make an annual report to the Minister of National Defence on LOAC education and training in the CF.

(c) The Minister should be obliged to table a copy of the CDS's annual report in the House of Commons and Senate.

Notes

INTRODUCTION

1 On April 24, 1992, the UN Security Council adopted resolution 751, establishing UNOSOM; see the proceedings of the Commission, exhibit P75, Document Book 26, p. 41. On August 28, 1992, the Minister of National Defence announced that the Canadian government was offering 750 CF service members to UNOSOM, see *House of Commons Debates*, August 28, 1992, p. 14783. Only a few CF members deployed as part of the Canadian Contingent United Nations Operations in Somalia (CCUNOSOM), although initially the Canadian Airborne Regiment augmented by other members to 750 persons was supposed to deploy as part of CCUNOSOM.

2 UNITAF was created as a result of UN Security Council resolution 794 on December 3, 1992; see exhibit P-75, Document Book 26, at p. 46. The Canadian Airborne Regiment was part of Canadian Joint Forces Somalia (CJFS) and of UNITAF. The expanded United Nations Operation in Somalia (UNOSOM II) was established by UN Security Council resolution 814 on March 26, 1993; see exhibit P-75, Document Book 26, at p. 49. The turnover from UNITAF to UNOSOM II took place on May 4, 1993 at which time Canadian Joint Forces Somalia (CJFS) came under the operational control of UNOSOM II; see exhibit P-289.7, Document Book 83G, Tab 19.

3 Queen's Regulations and Orders for the Canadian Forces (QR&O), Vol. I, article 19.015, requires officers and other members of the Canadian Forces to obey "*lawful* commands and orders," and s. 83 of the *National Defence Act*, R.S., c. N-5, makes it an offence to disobey a "*lawful* command of a superior officer." [Emphasis added.]

CHAPTER ONE — NATIONAL LAW

1 Law Reform Commission of Canada, *Extraterritorial Jurisdiction* (Ottawa: Ministry of Supply and Services Canada, 1984; Working Paper 37), p. 8.

2 The articles of the *Somali Penal Code* mentioned in this study are taken from Martin A. Ganzglass, *The Penal Code of the Somali Democratic Republic* (New Brunswick, NJ: Rutgers University Press, 1971). In the Preface, Ganzglass, an American lawyer, mentions that he had worked as legal adviser to the Somali National Police Force and as a legal assistant to the Ministry of Justice. As to the actual text of the Code provisions that appear in the book, Ganzglass states in the Preface, at pp. xiii-xiv:

> Since the Somali Penal Code is based on the Italian one, it was drafted, passed, and officially published in Italian. A semiofficial English-language translation was prepared by United Nations personnel for use among English-speaking Somalis, primarily in the northern regions. The translation is confusing, ungrammatical, and often incorrect. However, because of its semiofficial status as a translation of an existing law, I have retained the wording of the translation but pointed out errors in translation and grammar in the explanatory sections...this book...is a current [as of August 1969] valid text about the functioning of the criminal law in Somalia.

3 *UN Chronicle: A Quarterly Magazine*, Vol. XXX, No. 4, p. 26.

4 *In the Matter of a Reference as to whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts,* [1943] S.C.R. 483.

5 Under the *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, 75 U.N.T.S. 135 (Third Convention) prisoners of war, that is, captured enemy combatants cannot be prosecuted or punished for having fought in accordance with LOAC. On this point, Eric David, *Principes de droit des conflits armés* (Bruxelles: Bruylant, 1994) (Series: Précis de la Faculté de droit de l'Université Libre de Bruxelles), article 2.192 at 348-349, writes: "En temps de guerre, certaines catégories de personnes peuvent accomplir des actes qui, en toute autre circonstance, feraient partie des infractions les plus gravement punies par le code pénal de tous les États du monde — coups et blessures, appropriation et destructions de biens publics et privés, enlèvements, séquestrations, attentats à l'explosif, homicides volontaires, etc. — , mais qui, en l'occurence, sont non seulement permis, mais même encouragés."

6 M.J. Kelly, "Legal Regimes and Law Enforcement on Peace Operations," in Hugh Smith, ed., *The Force of Law: International Law and the Land Commander* (Canberra: Australian Defence Studies Centre/Australian Defence Force Academy, 1994), 189 at 193.

7 Law Reform Commission of Canada, *Extraterritorial Jurisdiction*, *supra* Chapter 1, note 1. The NATO SOFA appears in QR&O, Vol. IV, Appendix 2.4. [Emphasis added.]

8 [1943] S.C.R. 483, *supra* Chapter 1, note 4.

9 The *Visiting Forces Act*, R.S., c. V-2. This Act governs the status of foreign armed forces in Canada, not the status of Canadian Forces visiting foreign countries.

10 [1943] S.C.R. 483 at 485, *supra* Chapter 1, note 4.

11 [1943] S.C.R. 483 at 485, *supra* Chapter 1, note 4.

12 "The Situation in Somalia: Report of the Secretary-General, Addendum," UN Document S/23829/Add. 1, 21 April 1992, p. 4, para. 10.

13 "Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and 19 of Resolution 794 (1992)," UN Document S/25354, March 3, 1993, p. 9, para. 41.

14 Law Reform Commission of Canada, *Extraterritorial Jurisdiction*, *supra* Chapter 1, note 1, p. 9. Other principles of international law mentioned in that Working Paper are unlikely to apply in the context of the Somali operations.

15 *Criminal Code*, R.S., c. C-46, ss. 6(2) and 8(1).

16 *National Defence Act*, R.S., c. N-5, s. 130(1):

130. (1) An act or omission

(a) that takes place in Canada and is punishable under Part XII of this Act, the *Criminal Code* or any other Act of Parliament, or

(b) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part XII of this Act, the *Criminal Code* or any other Act or Parliament,

is an offence under this Part and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

17 *Criminal Code*, R.S., c. C-46.

18 *Geneva Conventions Act*, R.S., c. G-3.

19 Section 273 of the *National Defence Act*, R.S., c. N-5, states:

273. Where a person subject to the Code of Service Discipline does any act or omits to do anything while outside Canada which, if done or omitted in Canada by that person, would be an offence punishable by a civil court, that offence is within the competence of, and may be tried

and punished by, a civil court having jurisdiction in respect of such an offence in the place in Canada where that person is found in the same manner as if the offence had been committed in that place, or by any other court to which jurisdiction has been lawfully transferred.

20 "Grave breaches" are enumerated and described in each of the four 1949 Geneva Conventions in some detail. In general, grave breaches involve the killing or serious injury of prisoners of war or any other "protected persons" or the serious destruction of property. Grave breaches are discussed in greater detail below.

21 *Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 U.N.T.S. 221 (hereinafter "Protocol I"); *Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II)*, 1125 U.N.T.S. 610 (hereinafter "Protocol II"). Protocol I and II are found as schedules V and VI of the *Geneva Conventions Act*, R.S., c. G-3. These are also found in exhibit P-10.1 of the Commission's proceedings.

22 *Criminal Code*, R.S., c. C-46, s. 7(3.71), which reads in part as follows:

... if,

(a) at the time of the act or omission,

(i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,

(ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or

(iii) the victim of the act or omission is a Canadian citizen

23 *National Defence Act*, R.S., c. N-5, s. 273, quoted in note 22.

24 *National Defence Act*, R.S., c. N-5, s. 130(2).

25 *National Defence Act*, R.S., c. N-5, s. 70, provides that a CF service tribunal cannot try any person charged with murder, manslaughter, sexual assault, sexual assault committed with a weapon or with threats to a third party or causing bodily harm, aggravated sexual assault or an offence under ss. 280-283 of the *Criminal Code* if that offence was committed in Canada.

26 *National Defence Act*, R.S., c. N-5, s. 70. Under s. 7(3.76) of the *Criminal Code*, a "war crime" must be committed during an international armed conflict.

27 *National Defence Act*, R.S., c. N-5, s. 132(1): " An act or omission that takes place outside Canada and would, under the law applicable in the

place where the act or omission occurred, be an offence if committed by a person subject to that law is an offence under this Part, and every person who is found guilty thereof is liable to suffer punishment as provided in subsection (2)."

28 *National Defence Act*, R.S, c. N-5, s. 69(1).

29 See *National Defence Act*, R.S., c. N-5, s. 69(2.1).

CHAPTER TWO — THE LAW OF ARMED CONFLICT (INTERNATIONAL HUMANITARIAN LAW)

1 Christopher Greenwood, *Command and the Laws of Armed Conflict* (Surrey: Strategic and Combat Studies Institute, 1993) (Series: Occasional Paper, No. 4) at 1-2. For more detailed information see the very recent prize-winning voluminous work on the subject, see David, *Principes de droit des conflits armés, supra* Chapter 1, note 5. See also, Hans-Peter Gasser, *International Humanitarian Law — An Introduction*, trans. from German by Shelia Fitzgerald and Susan Mutti (Haupt: Henry Dunant Institute, 1993, and being a separate print from Hans Haug, *Humanity for All* (International Red Cross and Red Crescent Movement)); Stanislaw E. Nahlik, "A Brief Outline of International Humanitarian Law," *International Review of the Red Cross*, July-August 1984; and *Basic Rules of the Geneva Conventions and their Additional Protocols* (Geneva: International Committee of the Red Cross, 1983).

2 Pietro Verri, trans. by Edward Markee and Susan Mutti, *Dictionary of the International Law of Armed Conflict* (Geneva: International Committee of the Red Cross, 1992) at 65-66.

3 Nahlik, "A Brief Outline of International Humanitarian Law," *supra* Chapter 2, note 1, p. 7 of the extract version.

4 U.K., Ministry of Defence, *The Law of Armed Conflict* (D/DAT///35/66; Army Code 71130 Revised 1981); U.S. Department of the Army, *The Law of Land Warfare* (Department of the Army, July 1956) (Series: Department of the Army Field Manual; FM 27-10); Christophe Swinarski, *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet* (Geneva: International Committee of the Red Cross and Dordrecht: Martinus Nijhoff, 1984).

5 *Canadian Forces Law of Armed Conflict Manual (Second Draft)* (Ottawa: Office of the Judge Advocate General, 1984).

6 The expression used in the Order-in-Council setting out the Commission's terms of reference, P.C. 1995-442, is "Canadian Joint Task Force Somalia"; however it was legally established as "Canadian Joint Force

Somalia" (CJFS). See the "Ministerial Organization Order 93073" of January 13, 1993 made pursuant to s. 17(1) of the *National Defence Act*, R.S., c. N-5, which is exhibit P-72.1 at the Commission's proceedings.

7 Relevant provisions of the Terms of Reference are operational readiness (para. (c)); training (para. (e)); discipline (para. (f)); leadership re: operations and training (para. (I)); conduct of mission (para. (k)); attitudes toward lawful conduct of operations (para. (m)); and rules of Engagement (para. (o)).

8 The Geneva Conventions for the Protection of Victims of Armed Conflict, signed at Geneva on August 12, 1949, namely: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, 75 U.N.T.S. 31 (First Convention); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949*, 75 U.N.T.S. 85 (Second Convention); *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, 75 U.N.T.S. 135 (Third Convention); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, 75 U.N.T.S. 287 (Fourth Convention). The four conventions can be found in schedules I to IV of the *Geneva Conventions Act*, R.S., c. G-3, or as exhibit P-10 of the proceedings of the Commission.

9 Gasser, *International Humanitarian Law — An Introduction*, *supra* Chapter 2, note 1, at 6-8; Nahlik, "A Brief Outline of International Humanitarian Law," *supra* Chapter 2, note 1; and *Basic Rules of the Geneva Conventions, supra* Chapter 2, note 1 at 7-8 of the extract version.

10 L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 1993) (Series: Melland Schill Monographs in International Law) at 18-27, reviews these historical sources.

11 For an enlightening and detailed exposition on medieval chivalric law of arms, see Theodore Meron, "Shakespeare's Henry the Fifth and the Law of War" (1992), 86 *American Journal of International Law* at 1-45.

12 *De Jure Belli ac Pacis*, as cited by Green, *The Contemporary Law of Armed Conflict*, *supra* Chapter 2, note10.

13 For examples, see Emmanuel G. Bello, *African Customary Humanitarian Law* (Geneva: Oyez: International Committee of the Red Cross, 1980).

14 "Instructions for the Government of Armies of the United States in the Field" (General Orders No. 100), or "Lieber Code" as it is now called, see Gasser, *International Humanitarian Law — An Introduction, supra* Chapter 2, note 1 at 7 and 9.

15 For a full list of Conventions and other international instruments that are sources of the law of armed conflict see David, *Principes de droit des conflits armés*, *supra* Chapter 1, note 5, at 48-53.

16 There are 13 conventions; see in particular Convention IV: "Hague Convention with Respect to the Laws and Customs of the War on Land" particularly the Annex thereto embodying the Regulations with Respect to the Laws and Customs of War on Land, often referred to as 'Rules'" and Convention V: "Hague Convention on the Rights and Duties of Neutrals in Land Warfare."

17 The Geneva Conventions for the Protection of Victims of Armed Conflict, *supra* Chapter 2, note 8.

18 Protocol I and Protocol II, *supra* Chapter 1, note 21.

19 Hans-Peter Gasser, "Negotiating the 1977 Additional Protocols: was it a waste of time?" 81 at 85, and Georges Abi-Saab, "The 1977 Additional Protocols and general international law: some preliminary reflexions," 115 at 116-117, both articles in Astrid J.M. Delissen and Gerard J. Tanja, eds., *Humanitarian Law of Armed Conflict — Challenges Ahead: Essays in Honour of Frits Kalshoven* (Dordrecht: Martinus Nijhoff Publishers, 1991). Professor Abi-Saab in support of this view refers at p. 117 to the World War II war crime trials of: *Judgement of the International Military Tribunal for the Trial of Major War Criminals*, HMSO (1946), Cmd. 6964, at 64, and the *Judgement of the International Military Tribunal for the Far East of 1948, UN War Crimes Commission*, 15 Law Reports of Trials of War Criminals 15 (1949).

20 Green, *The Contemporary Law of Armed Conflict*, *supra* Chapter 2, note 9, at 29.

21 Green, The Contemporary Law of Armed Conflict , *supra* Chapter 2, note 9, at 331.

22 Green, *The Contemporary Law of Armed Conflict*, *supra* Chapter 2, note 9, at 331.

23 "Historical Development: Basic Principles, Concepts & Sources," in *Ninth Basic Law of Armed Conflict (LOAC) Course, 19 to 24 March 1995, TCTI — Cornwall, Ontario — Deskbook* (Ottawa: Office of the Judge Advocate General, 1995), course materials, Tab 4, at 5-6 (DND 164255-164256).

24 As of March 31, 1995, 185 states were party to the Conventions; see Jean-Philippe Lavoyer, "Refugees and internationally displaced persons: International humanitarian law and the role of the ICRC," *International Review of the Red Cross*, Vol. 35, No. 305 (March-April 1995), 162-191 at 163, note 3.

25 Protocols I and II of the Geneva Convention, *supra* Chapter 1, note 21.

26 As of March 31, 1995, 137 states were parties to Protocol I and 127 for Protocol II; see Lavoyer, "Refugees and internationally displaced persons," *supra* Chapter 2, note 24, 162-191 at 163, note 4. Canada is a party to Protocol I and II.

27 Jean Pictet et al., *The Geneva Conventions of 12 August 1949 — Commentary: I Geneva Convention* (Geneva: International Committee of the Red Cross, 1952) at 348.

28 Pictet et al, *The Geneva Conventions of 12 August 1949 — Commentary, supra* Chapter 2, note 27, at 348.

29 Protocol I, *supra* Chapter 1, note 21, art. 82.

30 [Emphasis added.]

31 Paul LaRose-Edwards, Jack Dangerfield and Randy Weekes, *Non-Traditional Military Training for Canadian Peacekeepers* (Ottawa: Public Works and Government Services Canada, 1997).

32 Article 1 of all four Geneva Conventions of 1949 (Common Article 1).

33 For example, article 47 of the First Geneva Convention states:

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as... possible in their respective countries, and, in particular, to include the study thereof in their respective programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.

Almost identical obligations are set out in the Second Convention (article 48), the Third Convention (article 127), and the Fourth Convention (article 144). Still more explicit provisions regarding obligations to teach what is in the Convention, including those of commanders, are found in articles 83 and 87 of Protocol I.

34 See Chapter 2, note 33.

35 First Convention, art. 49; Second Convention, art. 50; Third Convention, art. 129; Fourth Convention, art. 146; Protocol I, arts. 82, 86, 87.

36 First Convention, arts. 49-52; Second Convention, arts. 50-53; Third Convention, arts. 129-132; Fourth Convention, arts. 146-149, Protocol I, arts. 85-89.

37 Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989).

38 Theodor Meron, "The Geneva Conventions as Customary Law" (1987), 81 *American Journal of International Law* 348-370. See also the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, [1986] International Court of Justice Reports 3.

39 Abi-Saab, "The 1977 Additional Protocols and general international law", *supra* Chapter 2, note 19, 115 at 119.
40 Robert Kogod Goldman, "The Legal Regime Governing the Conduct of Operation Desert Storm" (1992), 23 *University of Toledo Law Review* 363 at 367.
41 Goldman, "The Legal Regime Governing the Conduct of Operation Desert Storm," *supra* Chapter 2, note 40, 363 at 364 and 370. Goldman cites extensively from "Dupuis, Heywood & Sarko, 'The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions — Remarks of Michael J. Matheson,' 2 *American University Journal of International Law and Policy* 419 (1987) (Remarks of Michael J. Matheson, Deputy Legal Advisor, U.S. Department of State, delivered on January 22, 1987 at the 6th Annual American Red Cross — Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions)."
42 In the four Conventions, articles 63, 62, 142 and 158, respectively; in Protocol I, article 1(2); the Martens clause is referred to in the Preamble of Protocol II.
43 International Convention with Respect to the Laws and Customs of War on Land (Hague II), July 29, 1899, as translated in Dietrich Schindler and Jiri Toman, eds., *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* (Geneva: Henry Dunant Institute, 1973) at 64. For original in French, see 187 C.T.S. 429 at 431. One writer has referred to its importance in defining "the ethical substratum of international humanitarian law": Geoffrey Best, "The Restraint of War in Historical and Philosophical Perspective", in Delissen and Tanja, eds., *Humanitarian Law of Armed Conflict*, *supra* Chapter 2, note 19, 3 at 17, note 16.
44 Rosemary Abi-Saab, "Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern" in Delissen and Tanja, eds., *Humanitarian Law of Armed Conflict*, *supra* Chapter 2, note 19, 29 at 222. [Emphasis added.]
45 Article 2 to all four Geneva Conventions.
46 Article 27, Fourth Geneva Convention.
47 Article 1 of Protocol II, Geneva Conventions.
48 The precise wording in article 1(1) is "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out

sustained and concerted military operations and to implement this Protocol."

49 This question is explored at length in Claude Emanuelli, *Les actions militaires de l'ONU et le droit international humanitaire* (Montreal: Wilson & Lafleur, 1995) (Series: La collection bleue — Faculté de droit, Section de droit civil, Université d'Ottawa). This subject has been considered also at several recent conferences by leading authorities from the UN, the ICRC, the academic community and armed forces: Ottawa, March 1995, organized by the Faculty of Law, University of Ottawa, and the Canadian Red Cross; and Geneva, October, 1995, organized by the UN and the University of Geneva. For a report on the latter and copies of papers delivered at it, see Jim Simpson, *Report of Jim Simpson "International Symposium: The UN and International Humanitarian Law, Geneva, Switzerland, October 19-21, 1995,"* 1995, unpublished (Commission's library call number REMS-14). See also Umesh Palwankar, ed., *Symposium on Humanitarian Action and Peace-Keeping Operations, Geneva, 22-24 June 1994 — Report* (Geneva: International Committee of the Red Cross).

50 See, for example, article 10 of the First Convention.

51 For a good statement of this position, see Michael H. Hoffman, "War, Peace and Interventional Armed Conflict: Solving the Peace Enforcer's Paradox," *Parameters*, Winter 1995-96, 41 at 44-45.

52 Hoffman, "War, Peace and Interventional Armed Conflict, *supra* Chapter 2, note 51, 41 at 49 (footnote omitted).

53 Ralph Zacklin, "The United Nations and International Humanitarian Law: General Report," delivered at the Symposium on "The United Nations and International Humanitarian Law," held in Geneva, October 19-21, 1995; a copy of this report can be found in *Report of Jim Simpson, "International Symposium," supra* Chapter 1, note 5, p. 18. Mr. Zacklin is Director and Deputy to the Under-Secretary General, Office of the Legal Counsel, United Nations.

54 Toni Pfanner, "Application of International Humanitarian Law and military operations undertaken under the United Nations Charter" in Palwankar, ed., *Symposium on Humanitarian Action and Peace-Keeping Operations, supra* Chapter 2, note 49, 49 at 58-59; see also: Daphna Shraga and Ralph Zacklin, "The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues" also in Palwankar, ed., *Symposium on Humanitarian Action and PeaceKeeping Operations, supra* Chapter 2, note 49, 39 at 42:

The thrust of the ICRC position has been that international humanitarian law principles, recognized as part of customary international law, are binding upon all states and upon all armed forces present in situations of armed conflicts. What is universally binding upon all States, must also be considered binding upon the universal organization established by States and recognized by them as an independent subject of international law.

55 C. Emanuelli, "Les forces des Nations Unies et le droit international humanitaire" paper presented at the Symposium on "The United Nations and International Humanitarian Law," held in Geneva, October 19-21, 1995; a copy of this report can be found in *Report of Jim Simpson, International Symposium, supra* Chapter 2, note 49, 1995 Tab "O," pp. 35, 36 and 37.

56 "Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations," UN document A/46/185 Annex. One clause from the Model Agreement is quoted in Palwankar, ed., *Symposium on Humanitarian Action and Peace-Keeping Operations, supra* Chapter 2, note 49, at 44; the same clause is also found in Green, *The contemporary law of armed conflict, supra* Chapter 1, note 10, at 325.

57 R.S., c. G-3. Canada signed the Conventions in 1949, but did not ratify them until May 14, 1965, and became formally bound to respect and apply them on November 14, 1965, when Parliament enacted the *Geneva Conventions Act* in 1965, S.C. 1964-65, c. 44.

58 *Geneva Conventions Act*, R.S., c. G-3, s. 3(1).

59 *Geneva Conventions Act*, R.S., c. G-3, s. 3(2).

60 *Geneva Conventions Act*, R.S., c. G-3, s. 8. See also "Prisoner-of-War Status Determination Regulations" made by the Minister of National Defence, SOR/91-134 of February 1, 1991, in QR&O, Vol. IV, Appendix 1.5.

61 Exhibit P-10.2 of the Commission's proceedings, Department of National Defence, *Unit Guide to the Geneva Convention* (DND Canada, 1990) (Series: Military Training, Vol. 4), B-GL-318-004/FP-001 at 5-1 states: "the provisions outlined in this chapter should be regarded as the minimum standard of treatment of any civilians with whom our armed forces come in contact."

62 On December 10, 1992, LCol Watkin of the CF Judge Advocate General Office lectured at Canadian Forces Petawawa on the LOAC to the officers of CARBG. LCol Watkin testified at the first General Court-Martial of LCol Mathieu and stated the following about his lecture,

exhibit P-34.2, *Transcript of the General Court-Martial of LCol Mathieu*, Vol. 2:

> With respect to their mission I indicated that technically the law of armed conflict did not apply because Somalia was not a situation of one state against another state, which is the premise of the Geneva Convention. This was a different situation, it didn't apply on all fours, that they would likely be faced with something running from a police action to a low intensity conflict guerrilla type action to something approximating what might be traditionally considered to be an armed conflict....
>
> *I indicated the operations would be guided by the law of armed conflict, that they couldn't go wrong by following them*...[p. 243] [Emphasis added.]
>
> ....I indicated that in Somalia again they would be going from a policy to an all out armed conflict, that they would be detaining people under a policing action, that was the role they were involved in, they were to be treated as if they were prisoners of war, whoever they detained; they were to be handed over to the military police, and for the soldier they were to treat everyone captured as a prisoner of war, that that's how we trained our folks and they should only be required to work at the one standard, the highest standard. There were to be no reprisals and no hostages.
>
> I went through at some length as to the status for prisoners of war, like I referred to them as detainees under the Geneva Convention, and indicated that it could apply to what we might think of as criminals all the way up to folks who were involved in firing at us...went through basically the requirements in the Geneva Convention for the treatment of prisoners of war. [pp. 256-257]

63 The *National Defence Act*, R.S., c. N-5, s. 69(2.1), states:

> Every person subject to the Code of Service Discipline at the time of the alleged commission by that person of a service offence under section 130 that relates to a grave breach referred to in subsection 3(1) of the *Geneva Conventions Act* continues to be liable to be charged, dealt with and tried at any time under the Code of Service Discipline.

64 Smith, ed. *The Force of Law: International Law and the Land Commander, supra* Chapter 1, note 6, p. 263.

65 David Hurley, "An Application of the Laws of Armed Conflict," in Smith, ed., *The Force of Law: International Law and the Land Commander, supra* Chapter 1, note 6, 179-187 at 182.

66 Kelly, "Legal Regimes and Law Enforcement on Peace Operations," *supra* Chapter 1, note 6, 189-204 at 190-192 and 195-196. Major Kelly was a legal officer with the Australian Defence Force Contingent in Somalia.

67 Kelly, "Legal Regimes and Law Enforcement on Peace Operations," *supra* Chapter 1, note 6, 189-204 at 190.

68 See U.S. Department of State and Department of Defense, "Responsibilities and Obligations Applicable to Contacts with the Somali Population During Operation Restore Hope," 24 December 1992, third paragraph, p. 1: "The common article 3 principles continue to apply to the situation in Somalia. Adherence to these principles is consistent with accomplishment of the humanitarian mission and defense of U.S./International forces as may be necessary." This document is referred to by Emanuelli, *Les actions militaires de l'ONU et le droit international humanitaire*, *supra* Chapter 9, note 49, at 30, note 100.

69 See the testimonies at the Commission's hearings of: Capt (N) McMillan, October 30, 1995, Vol. 11 of the transcripts, p. 2114; Maj Wilson, December 14, 1995, Vol. 28, p. 5369; LCol Southen, December 14, 1995, Vol. 28, p. 5472; Col Labbé, February 11, 1997, Vol. 163, pp. 33301 and 33322; LCol Mathieu, February 20, 1997, Vol. 169, p. 34733.

70 *R.* v. *Brocklebank*, CMAC-383, April 2, 1996 (Strayer C.J. concurring with Décary J.A.; Weiler J.A. dissenting).

71 *R.* v. *Brocklebank*, CMAC-383, April 2, 1996, at 26-28 of the judgment of Décary J.A.

72 See "The Situation in Somalia: Report of the Secretary-General, Addendum," and "Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and supra note 15; 19 of Resolution 794 (1992)," *supra* Chapter 1, note 13.

73 Jean S. Pictet et al., *The Geneva Conventions of 12 August 1949 — Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958) at 47.

74 The quotation in the judgment, according to note 33 of the judgment, comes from: C. Pilloud, J. De Preux, Y. Sandoz, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, Martinus Nijhoff Publishers, 1987). [Emphasis added.]

75 *Department of National Defence, Unit Guide to the Geneva Convention* (DND Canada, 1990) (Series: Military Training, Vol. 4), B-GL-318-004/FP001.

76 See *Geneva Conventions Act*, R.S., c. G-3, s. 2.

77 In this connection s. 19 of the *National Defence Act*, R.S., c. N-5, simply states that "The authority and powers of command of officers and noncommissioned members shall be as prescribed in regulations." QR&O (regulations by the Governor in Council or the Minister) do NOT define "command" or "order" other than, in chapter 19 of Volume I to the extent that it gives examples of *un*lawful commands.

CHAPTER THREE — RULES OF ENGAGEMENT

1 Diary entry for Maj Seward, December 31, 1992, as quoted in the Commission's proceedings, exhibit P-274.1, Document Book No. 38A, Tab 13 (DND 015102).

2 The "Canadian Joint Force Somalia: Rules of Engagement — Operation Deliverance" form the Appendix to this study.

3 Department of National Defence, *Advance Copy — Use of Force in CF, Joint and Combined Operations (English), Vol. 1* (Ottawa: Department of National Defence, 1995) (NDID # B-GG-005-004/AF-005) at 2-2. See also Department of National Defence, *Joint Doctrine for Canadian Forces Joint and Combined Operations* (Ottawa: National Defence Headquarters, 1995) (NDID # B-GG-005-004/AF-000) at 5-7.

4 Department of National Defence, *Brief for the Commission of Inquiry into the Deployment of the Canadian Forces to Somalia: The Use of Force and Rules of Engagement*, 1995, p. 8/15, which is exhibit P-35, Tab C, at the Commission's hearings.

5 *R.* v. *Mathieu*, CMAC 379, November 6, 1995, p. 4.

6 Exhibit P-243.1, *Transcript of General Court Martial LCol (Retd.) Mathieu*, January-February 1996, Vol. 2, p. 290.

7 For opinions of Belgian military courts on the nature of ROE, see A. Andries, "Chronique annuelle de droit pénal militaire (1994-1995)," 76 (1996) *Revue de droit pénal et de criminologie* 23-53 at 46-47; and, regarding the armed forces of Canada, the United States and the United Kingdom, see Robert Brush, "Controlling the Use of Force by Canadian Soldiers: The Place of Rules of Engagement within the Military Justice System," unpublished paper, March 1996.

8 QR&O, Vol. I, art. 19.015.

9 *National Defence Act*, R.S., c. N-5, s. 83. Of course, the prosecution would have to prove that the person had been notified of the order; on this see QR&O, arts. 1.21, 4.26, 19.01, 19.015 and 19.02.

10 Exhibit 34.1, *Transcript of the General Court Martial of LCol Mathieu* (first trial), Vol. 1, p. 1. LCol Mathieu was acquitted of that only charge. LCol Mathieu was tried a second time on the same charge as a result of the Court Martial Appeal Court setting aside his acquittal and ordering a new trial. He was again acquitted. [Translation.]
11 Guy R. Phillips, "Rules of Engagement: A Primer," *The Army Lawyer*, July 1993, 4-27 at 8.
12 Department of National Defence, *Advance Copy — Use of Force in CF, Joint and Combined Operations (English), supra* Chapter 3, note 3.
13 Department of National Defence, *Advance Copy — Use of Force in CF, Joint and Combined Operations (English), supra* Chapter 3, note 3.
14 On American ROE for Somalia, see by Jonathan T. Dworken, *Rules of Engagement (ROE) for Humanitarian Intervention and Low-Intensity Conflict: Lessons from Restore Hope* (Alexandria, VA): Centre for Naval Analyses, 1993) and Jonathan T. Dworken, "Rules of Engagement: Lessons from Restore Hope" *Military Review*, Vol. 74, No. 9, September 1994, pp. 26-34; see also F.M. Lorenz, "Law and Anarchy in Somalia," *Parameters,* Vol. 23, No. 4, Winter 1993-94, 27-41.
15 See exhibit P-73, *Document Book No. 24*, Tab 16, Memorandum, "Development of Op Deliverance Rules of Engagement (ROE)," April 14, 1994, 2/3.
16 Mark S. Martins, "Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering," *Military Law Review*, Vol. 143, Winter 1994, 1160 at pp. 34-35.
17 Department of National Defence, *Brief for the Commission of Inquiry into the Deployment of the Canadian Forces to Somalia, supra* Chapter 3, note 4, at 9/15.
18 Martins, "Rules of Engagement for Land Forces," *supra* Chapter 3, note 16, at 45.
19 Department of National Defence, *Brief for the Commission of Inquiry into the Deployment of the Canadian Forces to Somalia, supra* Chapter 3, note 4, at 9/15-10/15.
20 Department of National Defence, Advance Copy — Use of Force in CF, Joint and Combined Operations (English), Vol. 1 (*supra* Chapter 3, note 3) and *Advance Copy — Use of Force in Joint Operations (English), Vol. 2* (Ottawa: Department of National Defence, 1995) (NDID # B-GG-005-004/AF-005). Note that the title of Vol. 2 is in error as it should be the same as Vol. 1.
21 Department of National Defence, *Advance Copy — Use of Force in CF, Joint and Combined Operations, Vol. 1, supra* Chapter 3, note 3, at iii

(Preface). The concept of "use of force directives or orders" is introduced in this volume. These written directives are based on self-defence and ROE, see p. 2-1.

22 Department of National Defence, *Advance Copy — Use of Force in CF, Joint and Combined Operations (English), Vol. 1 ibid.* at p. iii.

23 Department of National Defence, Advance Copy — Use of Force in CF, Joint and Combined Operations (English), Vol. 1 *ibid.* at p. iii.

24 Department of National Defence, *Joint Doctrine for Canadian Forces Joint and Combined Operations*, *supra* Chapter 3, note 3, at 5-7.

CHAPTER FOUR — DOUBLE JEOPARDY

1 See, for example, Martin L. Friedland, *Double Jeopardy* (Oxford: Clarendon Press, 1969); Law Reform Commission of Canada, *Double jeopardy, pleas and verdicts* (Ottawa: Law Reform Commission of Canada, 1991) (Series: Working Paper 63); and André Morel, "Les garanties en matière de procédure et de peines (alinéas 11b), f) et h), articles 12 et 14)" in Gérald-A. Beaudouin and Errol Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3rd ed. (Scarborough: Carswell, 1996) 12-1 to 12-64 at 1241-12-48.

2 See s. 130(1) of the *National Defence Act*, R.S., c. N-5, quoted in Chapter 1, note 16.

3 See s. 132(1) of the *National Defence Act*, R.S., c. N-5, quoted in Chapter 1, note 27.

4 Section 69(1) of the *National Defence Act*, R.S., c. N-5, provides: "Except in respect of the service offences described in subsection (2), no person is liable to be tried by a service tribunal unless the trial of that person begins before the expiration of a period of three years after the day on which the service offence was alleged to have been committed."

5 Section 69(2) and (2.1) of the *National Defence Act,* R.S., c. N-5, read:

> (2) Every person subject to the Code of Service Discipline at the time of the alleged commission by that person of a service offence of mutiny, desertion or absence without leave or a service offence for which the highest punishment that may be imposed is death continues to be liable to be charged, dealt with and tried at any time under the Code of Service Discipline.
>
> (2.1) Every person subject to the Code of Service Discipline at the time of the alleged commission by that person of a service offence under section 130 that relates to a grave breach referred to in

subsection 3(1) of the *Geneva Conventions Act* continues to be liable to be charged, dealt with and tried at any time under the Code of Service Discipline.

6 See s. 273 of the *National Defence Act*, R.S., c. N-5, quoted in Chapter 1, note 19.

7 See section, Sources of the Law of Armed Conflicts, The Geneva Conventions, above, page 38-39 this version of MS for definition of grave breach of the Civilian Convention; and see the *Geneva Conventions Act*, R.S., c. G-3, s. 3(1), which reads:
3.(1) Every person who, whether within or outside Canada, commits a grave breach referred to in Article 50 of Schedule I, Article 51 of Schedule II, Article 130 of Schedule III, Article 147 of Schedule IV or Article 11 or 85 of Schedule V is guilty of an indictable offence, and
(a) if the grave breach causes the death of any person, is liable to imprisonment for life; and
(b) in any other case, is liable to imprisonment for a term not exceeding fourteen years.

8 Section 2 of the *National Defence Act*, R.S., c. N-5, defines civil court as follows: "'civil court' means a court of ordinary criminal jurisdiction in Canada and includes a court of summary jurisdiction."

9 *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1995* (New York: United Nations, 1996) (UN document ST/LEG/SER.E/14) at 121-122.

10 See Ganzglass, *The Penal Code of the Somali Democratic Republic, supra* Chapter 1, note 2, at 15.

11 See Ganzglass, *The Penal Code of the Somali Democratic Republic, supra* Chapter 1, note 2 at 16.

12 *Martin's Annual Criminal Code 1997* (Aurora: Canada Law Book, 1996), at CC/26.

13 *R.* v. *Van Rassel*, [1990] 1 S.C.R. 225.

RECOMMENDATIONS

1 See *Ninth Basic Law of Armed Conflict (LOAC) Course, 19 to 24 March 1995, TCTI — Cornwall, Ontario — Deskbook*, Ontario (Ottawa: Office of the Judge Advocate General Office, 1995) document entitled "Soldier's Basic Rules"; Capt Gilchrist, revised by Capt Turner, "Infantry School: QL7 Course Master Lesson Plan," June 1994, exhibit P-373 of the Commission's proceedings, *Document Book 121*, Tab L; Office of the

Judge Advocate General, *You and the Law of War* (Ottawa: Office of the Judge Advocate General); and *Canadian Forces Law of Armed Conflict Manual (Second Draft), supra* Chapter 2, note 5.

2 Christopher Lamb, "The Land Commander and the Laws of Armed Conflict" in Smith, ed., *The Force of Law: International Law and the Land Commander, supra* Chapter 1, note 6, at 5, wrote:

> Napoleon urged aspiring commanders to "read and re-read the deeds of the Great Commanders' arguing that this "is the only way to learn the art of war". Today, it would be apt to add that aspiring commanders should also "read and re-read" the ICRC's Fundamental Rules of International Humanitarian Law and the 1949 Geneva Conventions and 1977 Protocols. This is because the Geneva Conventions and Additional Protocol I (which has universal application) bind all commanders and individual soldiers in the armed forces of any state engaged in international armed conflicts, regardless of whether or not they have been instructed in the Laws of Armed Conflict.

See also art. 87(2) of the 1977 Protocol I to the Geneva Convention of August 12, 1949, which "require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol."

APPENDIX

Canadian Joint Force Somalia Rules of Engagement Operation Deliverance

GENERAL

1. These OPERATION DELIVERANCE Rules of Engagement (ROE) are provided for Canadian forces operating under the auspices of United Nations Security Council Resolution (UNSCR) 794. These ROE constitute orders to Commanders and Commanding Officers and they are compatible with those provided for United States forces.

2. Canada will participate in the establishment of a secure environment for humanitarian relief operations in Somalia within a coalition of nations. To establish such a secure environment, Canadian Forces members are authorized to use all necessary means required to protect themselves, relief personnel, relief materiel, distribution sites and relief convoys. Commanders are to make every effort to control the situation without the use of force. When time and conditions permit, a potentially hostile force will be warned that Canadian forces will take action as required to achieve their mission.

3. The purpose of these Rules of Engagement is to provide guidance and instructions to Commanders and Commanding Officers, within the framework of overall political directives. These ROE define the degree and manner in which force may be applied and are designed to ensure that the application of force is carefully controlled. These ROE are intended to inform Commanders of the degree of constraint or freedom permitted when carrying out their assigned tasks. They are not intended for use to assign specific tasks. Rather, they are designed to help achieve Canadian objectives and maximum survivability

of Canadian forces in a confrontation with hostile forces. Nothing in these rules, however, negates a Commander's obligation to take all necessary and appropriate action in self-defence.

4. Military action against hostile forces or forces exhibiting hostile intent is authorized to the degree necessary to overcome an immediate threat. Commanders must exercise critical judgment before unilaterally employing force to execute their obligation for self-defence. Any force used should be limited in scope and intensity and conducted in such a manner as to discourage escalation.

APPLICABILITY

5. The precepts and ROE contained in this document must be used in consonance with Canadian and international law, and apply to all Canadian forces operating in the Somali Area of Operations, including the territorial waters, air space, and landmass of Somalia and international waters adjacent thereto. Once authorized, these ROE will remain in force until direction to the contrary is given.

6. Subordinate commanders may request additional direction through the commander Canadian Joint Forces Somalia (CJFS) if the existing guidance is insufficient or a particular situation is not adequately covered by the ROE. Clarification must be sought for any apparent discrepancy within ROE in effect.

DEFINITIONS OF HOSTILITY

7. The following definitions of hostility are to be used in conjunction with the application of these ROE:

   a. *Hostile Act.* An opposing force or terrorist unit commits a hostile act when it attacks or otherwise uses armed force against Canadian forces, Canadian citizens, their property, Coalition forces, relief personnel, relief material, distribution sites, convoys and noncombatant civilians, or employs the use of force to preclude or impede the mission of Canadian or Coalition forces.

   b. *Hostile Intent.* Hostile intent is the threat of imminent use of force against Canadian forces, Canadian citizens, their property, Coalition

forces, relief personnel, relief materiel, distribution sites, convoys and noncombatant civilians. A clear example of hostile intent would be the aiming of a weapon.

c. *Hostile Force*. Any individual, force or terrorist unit whether civilian, paramilitary or military, with or without national designation, that has committed a hostile act or demonstrated hostile intent.

d. *Terrorist Attacks*. Terrorist attacks are usually undertaken by civilian or paramilitary organizations or individuals under circumstances in which a determination of hostile intent may be difficult. The definitions of hostile act and hostile intent set forth above will be used in situations in which terrorist attacks are likely.

DEFENCE CONCEPT

8. *The Inherent Right of Self-Defence*. Nothing in these rules negates a Commander's obligation to take all necessary and appropriate action for self-defence. Self-defence is the act of defending a particular unit of Canadian forces, or an element or individual thereof, in the event of the demonstration of hostile intent or of a hostile act. The need to exercise self-defence may arise in situations ranging from apparently unrelated localized, low-level conflicts to prolonged engagements.

9. *Elements of Self-Defence*. The application of force depends upon two elements:

a. *Necessity*. The requirement that a hostile act occur or that a hostile force or terrorist unit exhibit hostile intent.

b. *Proportionality*. The requirement that the use of force, up to and including deadly force, be in all circumstances reasonable in intensity, duration, and magnitude based on all facts known to the Commander at the time, to counter the hostile act or hostile intent and to ensure the continued safety of Canadian forces, Canadian citizens, their property, Coalition forces, relief personnel, relief materiel, distribution sites, convoys and noncombatant civilians.

10. *Defence of Coalition Forces*. Canadian forces in the vicinity of a Coalition element which is attacked may use all means up to and including deadly force in support of that element.

11. *Defence of Relief Personnel and Supplies.* Canadian forces may use all means up to and including deadly force to defend relief personnel, relief materiel, distribution sites or convoys from attack.

12. *Defence of Noncombatant Civilians.* Canadian forces may use all means up to and including deadly force to defend noncombatant civilians from attack.

THREAT/RESPONSE

13. The following situations may constitute threats to the mission of Coalition forces to provide a secure environment for humanitarian relief operations within the mandate of UNSCR 794. Action may be taken as indicated:

    a. *Crew Served Weapons.* Crew served weapons are a threat to Canadian forces and the relief effort.

       Response. Commanders are authorized to use all necessary force up to and including deadly force, to confiscate or render militarily ineffective crew served weapons when these weapons interfere with the ability to provide a secure environment for humanitarian relief operations within the mandate of UNSCR 794.

    b. *Armed Individuals.* Armed individuals may be considered a threat to Canadian forces and the relief effort whether or not the individuals demonstrate hostile intent.

       Response. Commanders are authorized to use all necessary force, up to and including deadly force, to disarm groups or individuals that may be threatening the provision of a secure environment for humanitarian relief operations within the mandate of UNSCR 794. In the absence of a hostile act, individuals and associated vehicles will be released after any weapons are confiscated or rendered militarily ineffective.

14. The response taken to the above threat situations may result in hostile intent being demonstrated or a hostile act being committed in which case engagement is authorized in accordance with the following paragraphs.

ENGAGEMENT

15. Circumstances and limitations exist under which Canadian forces will engage hostile forces. Commander CJFS will ensure that subordinate commanders will act in accordance with the following guidelines to defend against a hostile act or hostile intent:

    a. *Attempt to Control Without the Use of Force.* The use of deadly force in to be regarded as a measure of last resort. When time and conditions permit, the hostile force should be warned and given the opportunity to withdraw or cease threatening actions. The on-scene commander should employ steps such as manoeuvres, visual signals, warning shots, or other comparable measures that do not involve the application of force to convince the hostile force to withdraw or cease its threatening action. Warning shots should only be used as a final means of warning. Since any course of action to increase protection may also increase the risk of provocation and escalation, careful planning for all eventualities, coupled with a sound operational assessment of the military evidence and indicators of possible hostile intent by a force or terrorist unit, is essential to support action taken.

    b. *Minimum Force to Control the Situation.* Although Canadian forces may use deadly force in response to a hostile act or when there is clear evidence of hostile intent, when the use of force in self-defence is warranted, the nature, duration, and scope of the engagement should not exceed that which is necessary and proportional.

    c. *Attack to Disable or Destroy.* An attack to disable or destroy hostile forces is authorized when it becomes evident that such action is the only prudent means by which a hostile act can be prevented or terminated. When such conditions exist, engagement is authorized only until the hostile force no longer poses an immediate threat. Response to hostile fire will be rapid and directed at the source of hostile fire, using only that force necessary and proportional to eliminate the threat.

    d. *Pursuit of Hostile Forces.* In situations for which disablement or destruction of a hostile force is required in self-defence, immediate

pursuit of the hostile force may be initiated and continued as long as that force constitutes an imminent threat.

AIR DEFENCE GUIDANCE AND CONSTRAINTS

16. There is no identified air threat. Prior to exercising the right to use deadly force, careful consideration will be given to:

    a. The difficulties of identifying aircraft;

    b. the presence of civil aircraft and the special treatment afforded such aircraft under international law;

    c. the possibility of aircraft being in distress and the crew being unaware of their position; and

    d. the possibility for errors in air defence systems.

17. Any approaching unidentified aircraft will be identified by any means available. Only if an aircraft commits a hostile act is engagement authorized.

18. *Missiles.* Unless otherwise notified, approaching airborne objects identified as missiles are to be considered hostile and engaged.

DETENTION AND HARASSMENT

19. *Detention of Personnel.* Personnel who commit a hostile act, demonstrate hostile intent, interfere with the accomplishment of the mission, or otherwise use or threaten deadly force against Canadian forces, Canadian citizens, their property, Coalition forces, relief personnel, relief materiel, distribution sites, convoys, noncombatant civilians may be detained. Detained personnel will be evacuated to a designated location for turn-over to appropriate military authorities.

20. *Unarmed Harassment.* If Canadian forces, Canadian citizens, their property, Coalition forces, relief personnel, relief materiel, distribution sites, convoys and noncombatant civilians are attacked or threatened by unarmed elements, mobs and/or rioters, Canadian forces are

authorized to employ minimum force to repel the attacks or threats. Canadian forces should *first* employ the following procedures:

a. verbal warnings to demonstrators (in native language, if possible);

b. show of force, including the use of riot control formations; and

c. warning shots.

21. *Use of Riot Control Agents (RCA).* Authority to approve use of RCA is delegated to Commander CJFS. No further delegation is authorized.

VIOLATION OF TERRITORIAL WATERS, AIRSPACE AND LANDMASS

22. *Right of Assistance Entry.* Ships or aircraft have the right to enter a foreign territorial sea or airspace without the permission of the coastal state to engage in bona fide efforts to render emergency assistance to those in danger or distress from perils of the sea. This right extends only to rescues where the location of the distress or danger is reasonably well known.

23. *Hot Pursuit — No Threat.* The Commander of a Canadian force in pursuit of a unit that will enter the territorial seas, internal waters, national airspace, or the landmass of another nation other than Somalia, will cease pursuit and will immediately report his actions to the Commander CJFS.

24. *Hot Pursuit — Imminent Threat.* A situation for which disablement or destruction of a hostile force is required in self-defence, immediate pursuit of the hostile force may be initiated and continued as long as that force remains an imminent threat to Canadian forces, Canadian citizens, their property, Coalition forces, relief personnel, relief material, distribution sites, convoys and noncombatant civilians. Canadian forces shall not pursue the hostile force into another nation's territorial waters, airspace, internal waters, or territory without that nation's consent, unless necessary as a self-defence measure against a threat that the third nation is unwilling or unable to eliminate.

25. *Cross Boundary Fire.* Response to hostile fire may be returned across the boundary of another nation without that nation's consent, if a

hostile force persists in committing hostile acts and if that nation is unable or unwilling to stop that force's hostile acts effectively and promptly.

SUPPLEMENTARY INSTRUCTIONS

26. *Psychological Operations (PSYOP).* Canadian Commanders are authorized to conduct/participate in psychological operations. PSYOP objectives can include but are not limited to the following:

    a. discourage hostile decisions to initiate or continue explicit threats, use of force, or open hostilities.

    b. reduce the effectiveness of adversary armed forces and intelligence systems.

    c. discourage escalation of hostilities both in geographic extent and in types of weapons used.

27. *Military Deception.* Canadian Commanders are authorized to use military deception to protect against attack and to enhance the security and effectiveness of Canadian forces. Commanders may employ any deception means available to deny potentially hostile forces the ability to accurately locate, identify, track, and target Canadian and Coalition forces except as constrained or otherwise prohibited by international law or agreement, directive, or these ROE.

28. *Unattended Means of Force.* Unattended means of force, including booby traps and mines are *not* authorized.

29. *Aerial Photography or Aerial Inspection.* Aerial photography or aerial inspection is permitted as required for mission accomplishment.

30. *ROE Changes.* Only the CDS will approve changes to these ROE. Recommended changes or additions must be submitted through Commander CJFS to CDS clearly supporting the request with substantiation.

31. *Release of Rules of Engagement.* These ROE, or portions thereof, may be provided to participating Coalition forces and friendly states for their information and suggested adoption.

Law Applicable to Canadian Forces in Somalia 1992/93

James M. Simpson

This study examines the legal bases for the applicability of Canadian criminal and military law and the possible applicability of Somali criminal law and the international law of armed conflict to the Canadian Forces in Somalia.

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